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# Federal Class Actions: Diminished Protection for the Class and the Case for Reform

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## I. INTRODUCTION

Amended Rule 23 of the Federal Rules of Civil Procedure was adopted in 1966 to make class actions more available, judicially efficient, and binding.[1] Class actions have made even small claims economically viable. Constitutional challenges to statutes or governmental practices, school integration, prisoners' rights, employment discrimination, antitrust claims, securities fraud, patent infringement, franchise disputes, consumers' claims, and product liability, as well as mass tort and breach of contract claims, all have been clearly established as being subject to class processes.[2] The proponents of amended Rule 23 contemplated the device would provide an additional method of enforcing consumer protection, antitrust, and in particular, civil rights laws. However, in the rapid growth and widespread use of the class device under the amended rule, procedural fairness and due process rights of absent class members have been reduced or lost.

Historically, absent members of the class were protected by the following legal principles: (1) adequacy of representation, and (2) notice to class members giving opportunity to appear or opt out. Adequacy of representation is comprised of four components: identity of claims, absence of conflict of interest, competency of the named representative, and qualified class counsel. Notice to class members, giving them an opportunity to appear or opt out, provided additional protection for the absent members of the class.[3] If an absent member chose to appear in the action, adequacy of representation became insignificant since the class member had individually participated. Adequacy of representation became irrelevant to class members who elected to opt out because the judgment was not binding as to them, and their claims were unaffected. Finally, the class members who, after notice, failed to appear or opt out were deemed to have consented impliedly to the representation as described in the notice; hence, adequacy of rep-

1. *See* FED. R. CIV. P. 23 advisory committee's note (1966).

2. *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation, Identity of Claims, and the Impact of* General Telephone v. Falcon, 54 OHIO ST. L.J. 607 (1993).

3. Historically, notice with opportunity to appear or opt out was not required if adequacy of representation was satisfied.

resentation was satisfied.[4] Except for the identity of claims requirement, in practice these safeguards have been weakened substantially under the amended Rule 23.

Identity of claims requires that the named representative present the same claims as the class, based on the reasoning that the self-interest of the representative serves as motivation to litigate, to prove facts, and to negotiate a settlement fair to the entire class. In addition, there must be an absence of conflict between the interests and remedies of the representative or counsel and the interests and remedies of the class. Finally, the named representative and counsel must be competent to present the issues. If these four components are satisfied, class judgments, including settlement judgments, are binding and entitled to full faith and credit.

The identity of claims requirement for adequacy of representation was theoretically strengthened by *General Telephone Co. v. Falcon*,[5] which demands a rigorous examination of the claims and issues by the court.[6] The 700 cases examined in a recent study by the author establish that the representative must assert the same claims and issues as the class.[7] Furthermore, the cases that have followed *General Telephone* continue to require identity of claims,[8] with few exceptions.[9]

The absence of a conflicts of interest requirement tends to obscure and confuse the analysis of competing interests and ultimately provides limited protection for the class.[10] Obvious factors outside the class structure such as preferences to representatives that may affect identity of claims are ignored,[11] and differences as to remedies sought and intra-class dissent are overlooked as being not relevant to the very subject matter of the litigation.[12] Furthermore, major conflicts between class counsel and the class are not covered within the scope of this doctrine.[13]

4. In this situation, the notice must be sufficient, and the named representative and counsel must nevertheless proceed competently in the presentation of the case and avoid forbidden conflicts of interest.
5. 457 U.S. 147 (1982).
6. *Id.*
7. See Downs, *supra* note 2.
8. Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 597 (7th Cir. 1993); Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1569-70 (11th Cir. 1992); Tucker v. Union Underwear Co., 144 F.R.D. 325, 328-39 (W.D. Ky. 1992); Bishop v. New York City Dep't of Hous. Preservation and Dev., 141 F.R.D. 229, 236-37 (S.D.N.Y. 1992).
9. Johns v. DeLeonardis, 145 F.R.D. 480, 483 (N.D. Ill. 1992); CV Reit, Inc., v. Levy, 144 F.R.D. 690, 696 (S.D. Fla. 1992); Lerch v. Citizens First BanCorp, 144 F.R.D. 247, 251 (D.N.J. 1992); Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 200 (S.D.N.Y. 1992); *In re* Revco Sec. Litig., 142 F.R.D. 659, 666 (N.D. Ohio 1992).
10. *See* discussion *infra* Part II.
11. *See* discussion *infra* subsections II.B.2. and II.B.3.
12. *See* discussion *infra* subsection II.B.4.
13. See discussion *infra* section II.C.

Adequacy of representation has been further abrogated by the steadily diminishing role of the class representative. Notwithstanding *General Telephone*, class representatives are largely ignored by class counsel and the court. Class counsel is not required to consult with the representative as to class proceedings, and the representative has no right to receive information, to participate in key decisions such as settlement and appeal, and to discharge counsel. Should the representative object, his view is invariably overruled by judges bent on settlement. Thus, representation by named parties provides little or no check on the increasing domination by class attorneys.[14]

Class counsel, unrestrained by the codes of professional responsibility or monitoring by representatives, have a greatly enhanced role in these lawsuits, which they initiate, finance, and for the most part control. Although class counsel have major conflicts with the class with respect to attorneys' fees, settlement, and fee sharing, judicial scrutiny of such conflicts is minimal.[15]

The alternative and supplemental protection of notice giving opportunity to appear or opt out has also been reduced by the amorphous categories of the amended rule. In certain categories of class actions—the so-called "mandatory" (b)(1) and (b)(2) classes—the historical protection of notice to class members giving them an opportunity to appear or opt out is not required, although the court has discretion to grant notice rights in such cases. Increasingly, courts are employing these mandatory categories, which simplify proceedings because notice is not required; however, mandatory categorization may result in substantial abuse to class members.

Categorization games have seriously jeopardized notice, appearance, and opt-out rights and have introduced irrational distinctions, which are distracting and confusing. Previously, any action that sought damages was classified as a (b)(3) class, which requires notice giving class members an opportunity to appear or opt out. Today, there is authority to the effect that any action which combines damages with injunctive relief ought to be a mandatory class action.[16] Even if notice is given, its content is often deficient and misleading.[17]

These concerns have not been resolved by judicial supervision because court approval is often procured with minimal review. Sweeping due process issues under the carpet of settlement proceedings is more aptly characterized as cheerleading than judicial inquiry. In as-

14. See discussion *infra* Part III.

15. *See* discussion *infra* section IV.D.

16. Mandatory classes based on a "limited fund" theory for category (b)(1)(B), or an "incompatible standards of conduct for the party opposing the class" theory for category (b)(1)(A) are being certified more frequently. *See* discussion *infra* Part V.

17. *See* discussion *infra* section V.E.

certaining the level of judicial scrutiny, the author examined the available files of all class actions completed in the Northern District of California from 1985 to 1993.[18] This study reveals extensive domination by class counsel and judicial laxity in overviewing crucial decisions of adequacy of representation, notice, certification, and settlement.

Settlement processes in particular do not adequately provide protection for the rights of absent class members.[19] In addition, once the settlement judgment has been approved by the trial court, the abuse of discretion standard of review and the rules forbidding interlocutory review make overturning such approval extremely difficult.[20] Notwithstanding inadequate settlement notice, a collateral attack based on denial of due process is also unlikely to succeed in settlement situations.[21] The Northern California study supports the need for substantial reform of amended Rule 23. Specific suggestions for such reform are given throughout this Article.

## II. CONFLICTS OF INTEREST

Courts routinely proclaim that to have adequacy of representation, there must be an absence of any conflicts of interest. This standard is not only obscure and confusing to apply but ultimately provides limited protection for class members. In reality, every class action involves numerous conflicts of interest which must be identified, analyzed, and evaluated prior to class certification and during the course of litigation, as well as throughout any settlement proceedings.

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18. *See infra* appendix A.

19. *See* discussion *infra* section VI.C. Absent class members are frequently affected by any number of the following problems related to settlement: (1) Pre-certification settlements, or settlements which are combined with certification proceedings, raise special problems of unauthorized and unsupervised negotiations. (2) Courts fail to require a showing or fail to determine the adequacy of representation, despite the "rigorous analyses" mandated by *General Telephone*. (3) In most actions, a record on the merits is unavailable. (4) The court does not participate in or demand information concerning settlement negotiations. (5) The named representatives are ignored. (6) Preferences to representatives and conflicts as to remedies remain undisclosed. (7) Detailed information concerning attorneys' fees and fee sharing agreements is not required, notwithstanding the inherent conflicts of interest and susceptibility to padded fees and costs. (8) Notices for settlement hearing are defective in failing to describe the facts of adequacy of representation or even to reveal that adequacy is an issue in settlement. Notices also do not disclose objections by the representatives. (9) Objections are frequently overruled without reasoned findings at the settlement hearing. (10) Onerous burdens are placed on objectors who are denied the very discovery and inquiry by which they could have met such burdens.

20. *See* discussion *infra* Part VII.

21. *See* discussion *infra* Part VIII.

The identity of claims requirement,[22] independent of conflict of interest considerations, provides that the class representatives have essentially the same claims as the class, thereby ensuring that their motivation and judgment concerning their own self-interests will inure to the benefit of the entire class. The named representative functions as a fiduciary to the class, with the duty to protect the absent class members in key decisions throughout the course of the lawsuit.[23]

The legal standard for evaluating adequacy of representation with respect to conflicts of interest is clear: if the alleged conflict would interfere with vigorous prosecution of class claims, representation will be denied. Outcomes vary, however, depending on the factual circumstances of each class action.[24]

## A. Factors Outside the Class Structure Which May Interfere with Representation

### *1. The Representative's Relationship with the Class Opponent*

A conflict of interest obviously exists where class counsel or the named representative acts in collusion with the class opponents.[25] Representation may also be denied if class counsel has represented the class opponent in other actions.[26] Furthermore, a plaintiff who

22. Conflicts of interest concepts differ from the identity of claims requirement, under which the claims of the class must be fairly encompassed within the claims of the representative. Hence, the representative of a broadly defined class who includes overreaching claims with his individual claims may not have any conflict of interest yet lack identity of claims. The fact that the representative fails to prove all the class claims does not establish a fatal conflict of interest, but the litigation may lack the requisite identity of claims. Regardless of the good faith of class representative and counsel in vigorously pursuing all class claims, identity of claims may still not be satisfied.

    Although identity of claims lessens the likelihood of conflict of interest from outside sources and enhances the prospect of vigorous prosecution, in that the representative's self-interest in litigating his own claim reduces the risk that class claims may not be fairly presented, the possibility of a conflict of interest in the presentation of claims is not necessarily eliminated by satisfying the identity of claims requirement. Outside influences which may potentially lead to conflicts are discussed *infra* section II.A.

23. *But see* discussion *infra* Part III (analyzing the diminished role of the representative).

24. *See* cases cited in 3B JAMES W. MOORE & JOHN E. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.07[3] (2d ed. 1993) and 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1768, 1769.1 (2d ed. 1986).

25. *See* Guenther v. Pacific Telecom, Inc., 123 F.R.D. 341 (D. Or. 1987).

26. *See In re* Fine Paper Antitrust Litig., 617 F.2d 22 (3rd Cir. 1980); Guenther v. Pacific Telecom, Inc., 123 F.R.D. 341 (D. Or. 1987); Richard H. Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787 (1983).

may be liable as a defendant in the class action is precluded from acting as class representative.[27]

### 2. *Competing Interests Between the Representative and the Class*

Ulterior motives of the class representative in pursuing the class action suit may cause representation to be denied.[28] For example, the filing of other lawsuits by the class representative against the same opposing party for purposes of harassment, revenge, or to gain competitive advantage may create forbidden conflicts of interest.[29] Possible competing interests which may lead to conflicts that are relevant to adequacy of representation include historically competitive or hostile relationships between the representative and members of the class. An example of such a conflict would be if one Native American

27. *See* Pistoll v. Lynch, 96 F.R.D. 22 (D. Haw. 1982); Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973).

28. *See* Lyon v. Ariz., 80 F.R.D. 665 (D. Ariz. 1978)(dismissing class allegations where wife of counsel for class would receive disproportionate benefit); DuPont v. Wyly, 61 F.R.D. 615 (D. Del. 1973)(representative had incentive to "throw" the suit in order to collect in separate action against defendant); Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 1970)(involving representatives who sought rescission of merger to protect pre-merger benefits not applicable to the class); Puharich v. Borders Elec. Co., 11 Fed. R. Serv. 2d (Callaghan) 510 (S.D.N.Y. Feb. 29, 1968)(representative's primary interest in injunctive relief motivated by foreclosure of damage remedy to representative's portion of the class).

29. However, the existence of such conflicts will not defeat the class action per se, notwithstanding the impact on adequacy of representation. *See* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980); Yearsley v. Scranton Hous. Auth., 487 F. Supp. 784 (M.D. Pa. 1979).

In *Pruitt*, 29 plaintiffs who were engaged in various facets of the commercial seafood industry sued Allied Chemical Corporation for discharging toxic waste into the James River and Chesapeake Bay. Plaintiffs sought both injunctive relief and damages and moved for certification on behalf of all residents of Virginia and Maryland whose livelihood or income was derived from catching, buying, selling, and processing seafood from the Chesapeake Bay or the James River. Although the plaintiffs admitted that there might be inconsistent equitable remedies sought by individual members of the class, the court without any substantial analysis as to remedies found that adequacy of representation was satisfied upon the creation of subclasses. Pruitt v. Allied Chem-Corp., 85 F.R.D. 100, 111-12 (E.D. Va. 1980).

In *Yearsley*, the plaintiff challenged the defendant's practice of giving priority in filling vacancies to persons who have maintained city residence for one year or more. Defining adequacy of representation as competent counsel plus absence of proof of conflict of interest on the part of class representative, the court allowed this lawsuit to proceed as a 23(b)(2) action in order to give res judicata effect. Although the court conceded that there were a number of possible factual distinctions among various plaintiff housing applicants, it did not consider the possible range of remedies which might have been sought by different applicants among the plaintiff class. Yearsley v. Scranton Hous. Auth., 487 F. Supp. 784, 787 (M.D. Pa. 1979).

tribe seeks to represent rival tribes in a single class action.[30] Conflicts of interest may also arise in defendant class actions. If the representative of a defendant class is in competition with the other class members, representation that necessitates disclosure of trade secrets would make the interests of the representative incompatible with those of the class members because the representative may sacrifice the legal interests of the class for the sake of protecting his own economic position.[31]

## B. Factors Within the Class Structure Which Create Conflicts of Interest

### 1. *The Representative Has a Separate, Personal Interest in the Subject Matter of the Action*

A representative may not use the class action device to resolve his own individual claims if that would result in conflicting claims or priorities in the subject matter,[32] even though such claims would be appropriate if the class were united against an outsider.[33] For instance, a representative who is serving her own self-interests by seeking determination of her interests in mineral rights vis-a-vis the class is not a proper class representative.[34] When the representative pursues her personal interest at the expense of the class, conflicts arise because the benefit to the representative could result in harm or reduction of benefits to other class members.

### 2. *Preferences Granted to Class Representatives*

If preferences are given to the class representative, the interest of the representative no longer coincides with that of the class. This situation may give rise to conflicts. To illustrate, a representative who is granted $50,000 from the settlement fund as a bonus for services or time expended will no longer be mirroring the class interest, since the $50,000 is certain to influence the representative's judgment on settlement. The representative and the class counsel who engineered the preference then become collaborators on a process which may conflict with the class interest.[35] Procedural safeguards in class action settle-

30. Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981). *See also* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100 (E.D. Va. 1980)(holding that class would be subdivided in light of long-running conflict between Virginia and Maryland watermen).
31. Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 70 (N.D. Ohio 1973).
32. *See* Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974)(finding conflict of interest where defendants' pricing system acted to favor some members of the plaintiff class while overcharging other members).
33. *See* Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).
34. Anderson v. Moorer, 372 F.2d 747 (5th Cir. 1967).
35. *See* discussion *infra* Part VI.

ments, which include judicial review and settlement notice, are insufficient to protect absent class members against this type of conflict.[36]

*3. Open and Obvious Dissent Within the Class*

The classic conflict of interest within the class occurs when a subgroup of the class opposes enforcement of a claim that the named representative and other class members are seeking to enforce.[37] Where such a conflict is open and obvious, class certification will be denied for inadequacy of representation.[38] However, parties may not challenge a class action based on mere speculation as to class dissent.[39] A positive showing of an open and obvious conflict within the class is required to defeat certification or to permit collateral attack for lack of due process.[40] Dissent may be resolved by redefining the class or dividing the class into subclasses, naming additional or different representatives, limiting the issues, or giving notice with an opportunity to appear or opt out.[41]

The glaring weakness of conflict of interest rules with respect to class dissent is their failure to ensure that the existence of class dissent is revealed to or evaluated by the court. Faced with increasingly heavy caseloads, courts are often more concerned with the settling of class actions which clears the calendar and are less inclined to engage

36. Indeed, the existence of such preference may not be disclosed at the time of the settlement hearing and it simply is executed as part of the "plan of distribution" of settlement funds. *See infra* appendix A.

37. *See* Hansberry v. Lee, 311 U.S. 32 (1940)(permitting collateral attack on grounds of inadequacy of representation and lack of due process where plaintiff sought to enforce a racially restrictive covenant on behalf of all landowners, and certain landowners within the targeted racial group opposed enforcement of the class action). *See also* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977)(denying certification based in part on the plaintiff's local union overwhelmingly rejecting the class suit).

38. *See* Gilpen v. AFSCME, 875 F.2d 1310 (7th Cir.) (holding that class action opposed to the Union's agency fee not permitted where portion of the class only sought refund of the excess fee), *cert. denied*, 493 U.S. 917 (1989).

39. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) (certifying class even with possibility of antagonism within class), *cert. denied*, 463 U.S. 1207 (1983).

40. Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270 (10th Cir. 1976)(denying certification where majority of tenants did not object to the security deposit regulations the class sought to have set aside); Schy v. Susquehannar Corp., 419 F.2d 1112 (7th Cir.) (declining to certify class in which 80% of the members voted in favor of the proposal to which plaintiff objected), *cert. denied*, 400 U.S. 826 (1970); WRIGHT ET AL., *supra* note 24, § 1768, n.11.

41. Some authority suggests that dissenters may be ignored if they seek to block the enforcement of legal rights. Such cases are often resolved by giving notice and opt-out rights. *See* Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507 (9th Cir. 1978); Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977); Martino v. McDonald's Sys., Inc., 81 F.R.D. 211 (N.D. Ill. 1979); HERBERT B. NEWBURG, NEWBURG ON CLASS ACTIONS § 1120h (1st ed. 1977).

in expensive and time-consuming searches for possible dissents which could prolong or further complicate the lawsuit.[42] Since courts have no specific duty to uncover intra-class dissent,[43] there is a strong tendency to gloss over dissenting views in the haste to resolve class suits.[44] In many cases, dissenting interests remain undisclosed and unexamined until the settlement hearing, at which time the dissenters have little or no chance of overturning the result.[45]

In most jurisdictions, the trial court is not required to make findings or a written record on the absence of conflicts. In addition, class attorneys have no established duty to ascertain anticipated conflicts or dissent or to bring them to the court's attention. Because such conflicts may defeat certification, reduce attorneys' fees, and complicate settlement negotiations and approval, there is little motivation for class counsel to inquire into possible matters of intra-class dissent. Even the parties opposing the class may ignore intra-class dissent if they anticipate a settlement judgment with a general release and res judicata, because developing the facts of dissent and conflict could thwart certification and settlement or encourage a collateral attack on due process grounds.

### 4. *Intra-Class Conflicts Which "Go to the Very Subject Matter of the Litigation"*

Even if the issue of intra-class dissent is raised before the court, courts are not required to take it into consideration unless such dissent goes to the "very subject matter of the litigation."[46] This amorphous standard further diminishes protection for the class.

Courts will tolerate some degree of dissent within the class, particularly if the courts perceive any available means to mitigate the impact of such dissent.[47] Thus, the potential for intra-class conflicts in

42. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1978).

43. In a series of school desegregation cases involving dissenting Hispanic interests, the courts sought neither the views of the representative nor the views of the dissenters in considering issues of class certification and integration plans, and denied subsequent motions filed by the Hispanic interests to intervene and form subclasses. Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); Bradley v. Milliken, 620 F.2d 1141 (6th Cir. 1980); Cisneros v. Corpus Christi Indep. Sch. Dist., 560 F.2d 190 (5th Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978).

44. Under the present class action category structure of (b)(1), (b)(2), and (b)(3), notice in essence is discretionary with the court and has little chance of being overturned for abuse of discretion.

45. *See infra* discussion Part VI.

46. WRIGHT, ET AL., *supra* note 24 § 1768, p. 327.

47. *See* Foltz v. U.S. News & World Report, Inc., 111 F.R.D. 49 (D.D.C. 1986)(involving motion for decertification of class based on alleged conflict resulting from

later stages of litigation is considered insufficient to deny certification, because such conflict is tangential to the subject matter of the litigation.[48] For example, disputes as to eventual remedies are generally ignored by the courts under this standard.[49] This ambiguous and generalized approach might result in substantial injury to particular persons and groups within the class, especially when the settlement plan of distribution adopts only certain remedies.[50] In the Northern District of California study inequality in the plan of distribution appeared in thirty-five percent of the cases, and the plan of distribution was not part of the settlement notice and approval hearing in forty-two percent of the cases.[51]

### C. Conflicts Between Class Counsel and the Class

Invariably direct conflicts arise between class counsel, the class, and its representatives with respect to attorneys' fees, settlement, fee sharing, and other issues. These conflicts, however, are permitted because the conduct of class counsel is ostensibly restrained by judicial supervision, monitoring by class representatives, and is governed by the codes of professional responsibility. In theory, the class represent-

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members of class having received and parted with financial interests in the employee profit sharing plan in differing years denied; court held that such conflict could be alleviated by having representative work with the class to show that the stock at issue was devalued each year, rather than pitting different members of the class against each other); Gordon v. Hunt, 98 F.R.D. 573 (S.D.N.Y. 1983)(in class action alleging manipulation of silver market by three exchanges, intra-class conflict due to differing purchase and sale dates by different class members held not to create conflict which goes to the very subject matter of the litigation because there were available means to minimize the potential for intra-class conflict by limiting class period).

48. *See* Social Serv. Union, Local 535 v. County of Santa Clara, 609 F.2d 944 (9th Cir. 1979)(involving unions which sought to challenge pay scales that allegedly discriminated against female employees; court of appeals held that it was too early to deny certification based on potential conflict within the union due to economic impact of the suit on male union members).

49. *See* International Woodworkers v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981)(holding that potential for conflicts that could arise at the remedy stage not a sufficient reason for denying initial class certification); Meyer v. MacMillan Publishing Co., 95 F.R.D. 411 (S.D.N.Y. 1982)(holding that differing damage theories asserted by the class, which would result in varying impacts on different subgroups within the class, does not create a conflict which goes to the very subject matter of the claim).

50. More commendable is a court which examines issue by issue to determine whether there is a conflict. *See* Knop v. Johnson, 667 F. Supp. 467 (W.D. Mich. 1987)(denying in part motion for decertification for inadequacy of representation in prisoner class action suit due to intra-class conflict after analysis of each issue as to conflict, such as mail policy, winter clothing, eating facilities, library access, and inmate employment), *appeal dismissed*, 841 F.2d 1126 (6th Cir. 1988). *See also* Wagner v. Taylor, 836 F.2d 578 (D.C. Cir 1987).

51. See *infra* appendix A.

atives are intended to stand as a check on class counsel who may settle claims too early or too cheaply, leave out claims, or give unjustified preferences to limited class members.[52]

In a later section on the development of the role of class counsel, these conflicts and the weakening of restraints on counsel will be explored in detail.[53]

## III. THE DIMINISHED ROLE OF THE CLASS REPRESENTATIVE

In a recent article, the author surveyed the history of class representation and reviewed over seven hundred federal cases on this subject.[54] As confirmed in *General Telephone Co. v. Falcon*,[55] the named representative is required to present predominantly the same claims as those of the class.[56] The representative's self-interest motivates him to litigate vigorously to prove facts from his personal experience which inure to the benefit of the class and to negotiate a settlement which is fair to the entire class.

In addition to identity of claims, adequacy of representation contemplates that the named representative is competent to present the claims on behalf of the class. To function competently, the representative must have an understanding, or at least an awareness, of the issues at stake.[57] Personal qualities such as ethical behavior and sense of responsibility are also considered in assessing the competency of the representative.[58] The financial capacity of the representative to pay for costs, including cost of notice in federal and state court, is also relevant.[59]

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52. *See* discussion *infra* Part III.
53. *See* discussion *infra* Part IV.
54. Downs, *supra* note 2.
55. 457 U.S. 147 (1982).
56. *Id.*
57. Darvin v. International Harvester Co., 610 F. Supp. 255 (S.D.N.Y. 1985); Efros v. Nationwide Corp., 98 F.R.D. 703 (S.D. Ohio 1983); Massengill v. Board of Educ., 88 F.R.D. 181, 186 (N.D. Ill. 1980); WRIGHT ET AL., *supra* note 24, § 1766; Jonathon R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 92-93 (1991).
58. *See* Darms v. McCulloch Oil Corp., 720 F.2d 490 (8th Cir. 1983)(involving misapplication of funds by a representative); Green v. Carlson, 653 F.2d 1022 (5th Cir.) (involving a history of filing repetitious and frivolous claims), *cert. denied*, 454 U.S. 944, (1981); Maddox & Starbuck, Ltd. v. British Airways, 97 F.R.D. 395 (S.D.N.Y. 1983)(criminal convictions); WRIGHT ET AL., *supra* note 24, § 1766.
59. Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *aff'd sub nom on other grounds*, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980).

In those states which authorize counsel to advance costs, the financial stake of the representative may be considered, but is not conclusive. Ingram v. Joe Conrad Chevrolet, Inc., 90 F.R.D. 129, 132 (E.D. Ky. 1981); Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968). *See also* WRIGHT ET AL., *supra* note 24 § 1767.

Notwithstanding the identity of claims and competency requirements for adequacy of representation, in practice, class representatives serve little beyond a nominal function. They are largely ignored by class counsel and the court and are not assured full participation in the class action proceedings. This diminished role is partly attributable to changing codes of professional conduct as applied in class action cases.

In ordinary non-class litigation the client is ultimately in charge of the case.[60] A dissatisfied client is free to discharge the attorney at any time, and the rules of professional conduct demand that the attorney accept such discharge. Class counsel, on the other hand, is appointed by the court and owes a fiduciary duty to the entire class, not just to the named plaintiffs; therefore, he cannot be discharged by the representative. Whereas in non-class litigation an attorney has a legal duty to abide by the client's decision on substantial issues such as settlement and appeal, he need not do so in class actions. In fact, even the attorney's duty to keep the client reasonably informed has limited application in the class action setting.[61] Class counsel generally do not communicate with class representatives, thereby effectively removing the representatives from the loop.[62]

The courts share with counsel the responsibility for reducing the role of class representatives. Although in the 1970s some courts required a high level of representative participation,[63] since then, the

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In only a few jurisdictions, the named representative must pay for or at least remain ultimately liable for all costs, including the cost of notice, but these rules are seldom enforced even when applicable.

60. In the traditional lawsuit, counsel owes the following duties to the client [the following abbreviations are used herein: MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983)("MC"); MODEL RULES OF PROFESSIONAL CONDUCT (1994)("MR"); CAL. RULES OF PROFESSIONAL CONDUCT (1992)("CRPC")]: (1) to keep the client reasonably informed; MC 7-8, 9-2, MR 1.4, CRPC 3-500; (2) to abide by the client's decision on substantial issues; MC 7-7, 7-8, MR 1.2; (3) to accept discharge by the client; MCDR 2-110(B)(4), MR 1.16; (4) not to charge unreasonable fees; MCDR 2-106(A)-(B), MR 1.5(a), CRPC 4200; (5) to act diligently; MCDR 6-101(A)(3), MR 1.3, CRPC 3-110.

61. *California Rules of Professional Conduct* require that written settlement offers be communicated to all the named representatives of the class. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-510 (1992).

62. *See generally* Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987).

63. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978)(finding abuse of discretion by the trial court and overturning a settlement that had been opposed by all the named plaintiffs and 70% of a subclass that was to receive no back pay, stressing that class action concepts contemplated that named representatives undertake a major role in key decisions), *cert. denied*, 439 U.S. 1115 (1979); Saylor v. Lindsley, 456 F.2d 896 (2nd Cir. 1972)(overturning settlement because the representative opposed the settlement and had not been informed of settlement negotiations).

courts have tended to ignore or minimize the function of class representatives.[64] Trial courts, under the abuse of discretion standard, are entitled to rely on able counsel who negotiate settlements at arm's length. The courts may also approve settlements regardless of opposition by a significant percentage of the class representatives or class, if such settlements are determined by the trial court to be fair, adequate, and reasonable.[65]

It is absurd to require representation by named plaintiffs, only to ignore them during relevant stages of the class action. Under the reasoning of the identity of claims and competency cases, representatives should maintain their vital role in providing a check on class counsel in areas of conflict between class counsel and the class. Meaningful participation requires notice and consultation between the representative and class counsel, with the representative's views being communicated to the court. Only court rules will enforce such participation.

First, courts should require class counsel to inform and consult with the named representatives on substantial issues, including negotiations, settlement offers, and appeal. A written record of such consultation should be made available to the court, which would also provide the court with greater insight as to the fairness or reasonableness of the settlement process. Second, the notice of settlement hearing should disclose the existence and substance of any opposition to the settlement, and the court should be specifically informed of the dissent and stated reasons therefor. Third, the court should request, in writing, the views of the named representatives on vital issues such as settlement. Accepting class counsel's spin on these views should not be sufficient for adequate representation. Lastly, if objections to settlement are made by named representatives, the court should prepare findings which specifically address these objections.

64. *See* Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983)(affirming the approval of settlement that was opposed by 23 of the 27 named representatives as well as by 40% of the class).

65. Grant v. Bethlehem Steel, 823 F.2d 20, 22-23 (2d Cir. 1987). A few recent cases have required notice to and participation by representatives and the class. *See* Reynolds v. King, 790 F. Supp. 1101, 1109 (M.D. Ala. 1990)(rejecting settlement for lack of class support, even though majority of plaintiffs did not file an objection, and reasoning that the court must look beyond the numbers to the total reality of the circumstances presented and extrapolate some picture of the true support for the proposed settlement decree). *See also* Wyatt v. Horsley, 793 F. Supp. 1053, 1055-56 (M.D. Ala. 1991)(rejecting settlement because class support was so small that attorney must be seen to have settled the lawsuit unilaterally without class backing, therefore settlement was presumably not in the best interests of the class). *Cf.* Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982) (approving settlement over representative's opposition because representative had been given opportunity to be heard and provided assistance of additional appointed counsel in opposing the settlement), *cert. denied*, 459 U.S. 1217 (1983); Parker v. Anderson, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982).

## IV. THE ENHANCED ROLE OF CLASS COUNSEL

### A. Initiating the Lawsuit

As noted in the prior section, class counsel is restrained little by the named representatives. Under the current practices of most courts, class counsel is not even required to inform or consult with the representatives, who remain virtually powerless as to the progress of a suit which is supposed to be redressing their own legal claims as well as those of the class. Additional power to class counsel flows from the following developments.

Ethical restraints on attorneys initiating lawsuits have diminished steadily over the last fifty years. In traditional litigation, the client initiates the lawsuit, and the client seeks out the attorney, not vice versa. An attorney who initiates contact with the client ("ambulance chasing") is subject to discipline for violation of professional ethics, including suspension or revocation of the license to practice law. In extreme cases, the attorney can even face possible criminal felony charges.

Today, a substantial portion of all litigation is attorney-initiated. Clearly, the majority of class action litigation is initiated by attorneys. Attorneys are now permitted to advertise and inform potential clients of their rights, targeting those who have similar or common claims from a single accident, product liability injuries, or overcharging by financial institutions. Such communications have the effect of informing the public of their rights, but they also encourage the filing of additional claims.

Although various states have some lingering restraints on solicitation, California has eliminated nearly all restraints. An attorney may solicit by advertisement, letter, business card, or any other medium, with the exception of oral in-person solicitations and solicitations to those known to be represented by other counsel. Additional restraints prohibit misrepresentations, deceptions, material omission of facts, transmitting in a manner which involves coercion or duress, or making guarantees, warranties, or predictions concerning the result of the representation. Finally, solicitation is prohibited when the attorney knows an individual is in such a physical, emotional, or mental state that he cannot be expected to exercise reasonable judgment.[66] In a market dominated by advertising, these minimal prohibitions are barely restrictive.[67]

66. For example, delivery of the solicitation at the scene of an accident or en route to a hospital or emergency care center is prohibited. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-400 (1992).

67. Recently, there were accusations in California that a group of crematoriums had negligently commingled the ashes of a number of deceased individuals. Various attorneys commenced radio advertising, informing the public as to this incident

Where the amount of each claim is so small that filing or maintaining individual lawsuits is pointless or impracticable, the class action device becomes the only effective means of enforcing such rights. Attorney initiation of class actions is seen as a way to enforce claims for these small sums, which would not be viable as separate lawsuits. Permitting solicitation and the initiation of lawsuits results in economic benefit to the bar, which in turn led to the alteration of the codes of professional conduct. Consequently, litigation costs in society have vastly increased. A balancing of the benefits of greater enforcement of rights against the additional economic and social costs may be a subject of interest for future economic historians. What is clear, however, is that current law allows the attorney to be the primary initiator of litigation, particularly in class actions.

In both class actions and in ordinary litigation, an attorney has the duty to act diligently. The failure to so proceed, particularly in class actions, may cause any resulting judgment to be lacking in adequacy of representation and accordingly void. However, because class actions proceed under judicial supervision, complaints against class attorneys are seldom heard by the state bar. Hence, the duty to act diligently has little impact in terms of mitigating the increasing dominance of the attorney in class actions.

The attorney also has the duty to avoid representing conflicting claims. This duty, however, does not require the attorney to ascertain intra-class dissent or conflicts. Such dissent, if discovered, tends to lessen the chance of certification or may cause the appointment of additional representatives and attorneys, which would result in reducing the pie by splitting attorneys' fees. Because it is not in the attorneys' financial interests to ascertain conflict and dissent, seldom will attorneys for the class voluntarily seek out and raise such issues before the court. Various cases dealing with conflicts, including those cited in the preceding Part, are normally raised by members of the class who feel that their dissenting positions are not being represented by class counsel.

Class attorneys have almost unlimited discretion with respect to the remedies sought. This may lead to substantial discrepancies within the class, yet these are generally not regarded as "conflicts."[68]

### B. Financing the Lawsuit

In a traditional lawsuit, the client and attorney negotiate an agreement with respect to attorneys' fees and costs. The generally accepted

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and soliciting claims, thereby helping to create a cause of action for psychological injury. *See* Claire Cooper, *Court Deals With Hurt Feelings; Plaintiffs Allege Desecration of Relatives' Bodies, Seek Damages*, SACRAMENTO BEE, Sept. 11, 1991, at A4.

68. *See* discussion *supra* subsection II.B.4.

modes of payment include hourly fees (perhaps varied by different hourly costs for different categories of attorneys, such as partners and associates), fixed fees, and contingent fees.[69] Attorney fee contracts may involve a combination of the above described methods, such as a fixed-fee retainer plus a reduced hourly fee, with a smaller contingent fee as a bonus in the event the client prevails in the lawsuit.

In civil litigation, the contingent fee is an invaluable tool for financing lawsuits and is now accepted as an integral part of the American legal system. Such arrangements align the interests of the client and the attorney who are both focused upon sustaining a maximum recovery. Contingent fees also encourage monitoring by clients who recognize that their participation in the litigation bears directly on their ultimate financial reward.

Historically, the costs of litigation—such as filing fees, witness fees, and other out-of-pocket expenses, as distinct from attorneys fees—could not be contingent; the client had to assume ultimate responsibility for such charges. Many states, however, began to permit attorneys to advance such fees, so long as the client assumed ultimate responsibility for repaying those advances.[70] Recent changes in the codes of professional responsibility of California and other states authorize attorneys to pay for costs and to be reimbursed from a successful recovery.[71] With this important change, there is no reimbursement to the attorney for such costs by the client in the event the class action does not succeed.

In class actions, responsibility for costs varies according to each state's code of professional responsibility.[72] As noted above, some jurisdictions prohibit attorneys from advancing costs to finance class ac-

69. A contingent fee is a percentage of any recovery obtained by way of settlement or trial. Some contingency contracts contain a scaled contingent fee, in which the percentage differs depending upon the stage of the litigation. For example, a 20% contingent fee upon filing, 25% upon beginning of discovery, 30% upon ending of discovery, 35% in the event of trial, and 40% in the event of appeal are common contingent fee percentages.

70. As a practical matter, the attorneys in these jurisdictions did not hold a client liable for these fees if a case was unsuccessful.

71. CAL. RULES OF PROFESSIONAL CONDUCT Rule 4-210(3) (1989).

72. *Compare In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 490 (D. Md. 1982)(attorneys telling clients that they had practice of never seeking reimbursement for costs found to be in violation of Code of Professional Responsibility; court held that if client is not financially responsible, the attorney by virtue of the financial advances is, in effect, a member of the class while also serving as class counsel) *and* Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 384 (E.D. Pa. 1974)(in class action filed to obtain interest on escrow accounts mandated by various banks, attorneys had agreed with the named representatives of the class that they would advance costs but that the representatives would be required to reimburse them; court held that inability of the named plaintiffs to reimburse costs will not defeat class action claim).

tions,[73] while others permit this practice so long as the class representatives remain ultimately responsible for litigation expenses.[74] In contrast, California permits all costs and services to be paid by the attorney on a contingent fee basis,[75] under the rationale that it is essential to the interests of enforcement, redress, and deterrence that the attorney be permitted to advance and finance the litigation. To illustrate, there is little likelihood that a representative with a $100 claim would have the resources and motivation to advance potential costs of $100,000 in order to give notice to all class members.[76]

In general, class litigation in which a common fund is created is analogous to contingent fee litigation in individual lawsuits—the attorney will not be paid unless the action yields some type of recovery. If the successful action creates a common fund, the attorney will be entitled to fees by reason of the contribution to that common fund. Moreover, a class action which involves statutory fees will normally result in payment to the attorney on an hourly fee basis.

A major difference in class action financing, however, is that there is no agreement in connection with fees between the attorney and the class representatives acting on behalf of the class. Attorneys' fees are determined by the court in a hearing after the receipt of various petitions by attorneys giving information concerning their services. Although court approval of attorneys' fees is essential for the protection of class members, such approval is non-adversarial in over eighty percent of class actions which conclude by way of settlement, and gives rise to various conflicts between class counsel and the class.

## C. Financial Conflicts Between Class Counsel and the Class

### *1. Attorneys' Fees*

There is a direct conflict between class counsel and the class with respect to the amount of attorneys' fees. Every dollar that the attorney receives in fees from the common fund comes out of money that

73. Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978)(court objected to attorney financing of class actions, reasoning that impropriety would be inevitable when attorney is confronted with potential for choosing a course of action which may benefit himself financially versus that which may benefit the class which he represents; judicial supervision and approval of any settlement held to be insufficient safeguards against this type of conflict).

74. Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 65 F.R.D. 379, 384 (E.D. Pa. 1974).

75. CAL. RULES OF PROFESSIONAL CONDUCT Rule 4-210 (1989).

76. *See In re* United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig., 122 F.R.D. 251, 257 (C.D. Cal. 1988) (California has no limitation upon advancement of costs by attorneys on a contingent fee agreement, therefore there is no impediment to attorney financing class action, especially given that in class actions there is need for substantially larger financing of the litigation, due to costs of notice in addition to standard discovery and pleading expenditures.).

would otherwise be disbursed to class members. To argue that the attorney will fairly allocate attorneys' fees as against the class is to argue against reality, against the vagaries of human nature, and against widely held public impressions of the legal profession.[77]

*2. The Settlement Conflict*

In a class action, it is normally in the financial interest of class counsel to settle the case at an early stage in common fund situations, while it may be in the best interest of the class to continue the litigation. Court rulings awarding a percentage of recovery, such as a "bench mark thirty percent" as attorney's fees, coupled with the attorney's desire to maximize hourly return, means that the attorney will be inclined to settle early.

To illustrate, if an attorney represents 10,000 members of a class who each have $1,000 claims, the attorney well may be advised to settle at an early stage for only $1,000,000. If at this stage the attorney has expended only 100 hours, his anticipated recovery under the benchmarks thirty percent of recovery would be $300,000, or $3,000 per hour (30% of $1,000,000 = $300,000 divided by 100 hours). If the litigation continues, the attorney expends more and more hours with less likelihood of getting the same return in terms of an hourly rate. Moreover, having incurred additional expenses in advancing costs to finance the litigation, the attorney has increased his out-of-pocket investment, and therefore risk, in the event the case proceeds to trial and is unsuccessful. Thus, the attorney, both in terms of risk and hourly return, will seek an early settlement even though the client will receive only $700 on a claim of $10,000 ($1,000,000 settlement less $300,000 attorneys fees and costs or $700,000 distributed to the 10,000 clients).

The client, on the other hand, has no such investment in costs and expenses, and faces little or no risk in proceeding with the case to trial. If class members believe their claim is really worth $10,000 each (or at least $8,000) it would be in their best interests to see the case brought to trial where they might receive a higher recovery. An $8,000,000 recovery after trial, even if as much as fifty percent of that amount goes toward attorneys' fees, would still result in a greater net return for the members of the class. This type of early settlement con-

77. This basic conflict is recognized in a number of decisions. *See* Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3rd Cir. 1977)(settlement agreement which provided for payment of a specified sum to the class and another set sum to counsel, where both sums had been negotiated simultaneously, held to involve inherent conflict of interest and could not be upheld without independent evaluation); Kraemer v. Scientific Control Corp., 534 F.2d 1085, 1092 (3rd Cir.)(refusing to allow attorney to be both class representative and class counsel; partner of attorney also not permitted to act as class counsel), *cert. denied*, 429 U.S. 830 (1976).

flict should be, but seldom is, an integral part of the court's analysis in determining the propriety of the settlement agreement which the court must approve under Rule 23(e).[78]

*3. Fee Sharing*

When a number of legal firms are in competition to be named as class counsel and the prospective costs are substantial, prospective class counsel may enter into an agreement to share the legal fees that might be awarded by the court. These fee-sharing arrangements are designed to eliminate competition among the prospective class counsel and to maximize the ultimate attorneys' fees by preventing conflicts which might reveal unsavory details of attorney activities such as overbilling. Fee sharing ensures that everyone gets a piece of the pie, and that the pie is larger.

Often fee-sharing arrangements among class counsel are not disclosed and are never known by the class or the court. In general, the *California Rules of Professional Conduct* provide that fee-sharing arrangements may occur only with the client's consent and that anyone sharing in the fees may receive only a reasonable return for his or her services.[79] California has modified even this requirement to authorize any fee sharing so long as the total amount charged to the client is not larger than it would have been without the fee-sharing arrangement. This standard, however, is almost impossible to determine by the court hearing the fee petitions in class action cases.[80]

The potential conflicts described above are deemed to be resolved by a court hearing concerning approval of attorneys' fees and approval of a settlement agreement.[81] Yet this assumption is not justified, given that in many instances, a court hearing on attorney fee petitions never occurs. Where the action is settled and there are no objections brought before the court, the courts in many of the over 700 cases examined in this study routinely have approved attorneys' fees without meaningful examination or inquiry.

78. *See* discussion *infra* subsection VI.A.4.

79. CAL. RULES OF PROFESSIONAL CONDUCT Rule 2-200 (1989).

80. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 216, 226 (2d Cir. 1987). In that case, the fee-sharing agreement provided that those who advanced money for costs were to receive three times the amount of that which they contributed. The court did not forbid all fee-sharing arrangements but noted that such arrangements may result in forbidden conflicts of interest between the attorneys and the class that may not be discernible from the terms of the settlement. The court placed a duty on class counsel to inform the class as well as the court of such fee-sharing arrangements in sufficient time in advance of the fee and settlement approval, so that objections could be made and new counsel hired to advance those objections.

81. John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS., Summer 1985, at 5, 26 (arguing judicial review is an insignificant barrier to collusive settlements).

## D. Inadequacy of Judicial Review of Attorneys' Fees

### *1. The Lodestar Method*

For a number of years until the early 1980s, courts followed the lead of the Third Circuit's *Lindy* decisions in calculating attorneys' fees on the "lodestar" basis.[82] Courts would multiply the number of hours spent by the attorneys' hourly rate to obtain a lodestar figure, which is then enhanced by the use of a multiplier to reflect the quality of the work and the contingent nature of the case. Courts came to realize, as the prescient judge in *Rosenfeld v. Black*[83] had observed:

> The measurement of proper fees is not always the time spent. A lawyer may at one extreme work doggedly to no end, or even mount a treadmill. Attendance to minutiae sometimes enhances the billing. And one is mindful of the apocryphal English solicitor who billed his client [for] "Thinking in bed, one guinea."[84]

Over time, some courts became increasingly impatient with the time-consuming analysis of billing records required of them under the lodestar approach. The lodestar analysis was criticized as causing duplication of effort, expenditure of unwarranted hours to increase fees, and waste of judicial resources by the detailed and time-consuming calculations which the method required, as well as discouraging timely settlements where attorneys have not yet accumulated sufficient hours to obtain a large lodestar fee.[85] The approach also resulted in several weeks delay of attorneys' fee decisions, which in turn delayed the distribution of the settlement fund to the class.[86]

Objections to the lodestar method were based on the implicit but largely unarticulated premise that attorneys pad their hours and otherwise engage in unethical activities to enhance their fees, and that key decisions pertaining to settlement are affected by counsel fees. In practice, faced with non-adversarial proceedings, courts became more lax in the use of multipliers. Whereas multipliers of 1.5 to 2 were common in the in the 1970s,[87] by the late 1980s multipliers of 3

82. *See* Lindy Bros. Builders v. American Radiator and Standard Sanitary Corp., 487 F.2d 161, 167-69 (3d Cir. 1973)("Lindy I"), *vacated*, 540 F.2d 102, 119-21 (3d Cir. 1976)(en banc)("Lindy II").

83. 56 F.R.D. 604 (S.D.N.Y. 1972).

84. *Id.* at 606 (citation omitted).

85. *See In re* Fine Paper Antitrust Litig., 751 F.2d 562, 588 (3d Cir. 1984); *In re* Union Carbide Consumer Prod. Business Sec. Litig., 724 F. Supp. 160, 166-69 (S.D.N.Y. 1989). *See also* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 286-87 (1977) (discussing problems with lack of uniformity and other defects); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 240-41 (1983)(documenting reasons for change from a percentage formula to a time formula for attorneys' fees).

86. *See In re* Activision Sec. Litig., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

87. *See In re* Folding Carton Antitrust Litig., 84 F.R.D. 245 (N.D. Ill. 1979)(using multipliers equivalent to lodestar 1.75 times); *In re* Master Key Antitrust Litig.,

to 4.5 were frequently applied.[88] Translated, this means that an attorney who charges a customary hourly rate of $400 would receive $1,600 per hour from the class fund at the expense of the non-appearing class. Eventually, judicial frustration and dissatisfaction with the lodestar formula's premium on time and random multipliers reached its peak in the Third Circuit's chastisement of attorneys in *In re Fine Paper Antitrust Litigation*.[89]

### 2. *The Percentage-of-Recovery Standard*

In 1990, the Ninth Circuit authorized a pure percentage of recovery approach in common fund cases with this summary of the current status of competing standards:

> Recently, a debate has arisen over whether attorney's fees awards in common fund cases should be calculated on a "lodestar" or "percentage of the fund" basis. Since at least the early 1970's, the tendency has been to award such fees according to a lodestar approach. Recently, however, courts have begun to reconsider this approach. The Supreme Court sparked this reconsideration when it endorsed the percentage-of-the-fund approach for common fund cases in a recent case. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)(unlike in the civil rights area, "the calculation of attorney's fees under the 'common fund doctrine' . . . is based on a percentage of the fund bestowed on the class"). . . .
>
> Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, however, we require only that fee awards in common fund cases be reasonable under the circumstances. Accordingly, either the lodestar or the percentage-of-the-fund approach "may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund."[90]

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1978-1 Trade Cas. (CCH) ¶ 61,887 (D. Conn. 1978)(two times to lead counsel, 1.75 times to co-lead counsel); Republic Nat'l Life Ins. Co. v. Beasley, 73 F.R.D. 658, 670-672 (S.D.N.Y. 1977)(using multiples up to two).

88. *See In re* Oak Indus. Sec. Litig., No. 830537-G(M), 1986 WL 28907 (S.D. Cal. July 1, 1986)(four times); Brewer v. Southern Union Co., 607 F. Supp. 1511, 1535 (D. Colo. 1984)(3.0, 3.35 times); *In re* Corrugated Container Antitrust Litig., 1983-2 Trade Cas. (CCH) ¶ 65,628 (S.D. Tex. 1983)(four times to lead counsel); J.N. Futia Co. v. Phelps Dodge Indus., Inc., 1982-2 Trade Cas. (CCH) ¶ 64,978 (S.D.N.Y. 1982)(three times multiplier used); Pacific Plumbing Supply Co. v. Crane Co., 1982-1 Trade Cas. (CCH) ¶ 64,473 (W.D. Wash. 1982)(court used multiplier of three times); *In re* Cenco, Inc. Sec. Litig., 519 F. Supp. 322, 327 (N.D. Ill. 1981)(court used multiplier of four times); Municipal Auth. of Town of Bloomsburg v. Pennsylvania, 527 F. Supp. 982, 993 (M.D. Pa. 1981)(court used multiplier of 4.5 times).

89. 751 F.2d 562 (3d Cir. 1984)(efforts at the district and appellate levels to calculate appropriate fees for competing applicants took longer than litigation of the complex case-in-chief). *See also* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 258 (1985)(condemning the *Lindy* lodestar analysis as "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar").

90. *See* Florida v. Dunne, 915 F.2d 542 (9th Cir. 1990)(citations omitted)(quoting Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 271 (9th Cir. 1989)).

The percentage-of-recovery standard has been extensively applied in the Northern District of California.[91] Judge Patel, in *In re Activision Securities Litigation*,[92] described the reasons for this approach:

> In the future . . . the court will opt for the percentage approach in common fund cases. This case demonstrates the reasons as discussed above. After three years of litigation, substantial discovery and motion practice, and on the eve of trial, a settlement was reached from which the attorneys will receive 32.8%, 22% of which was for attorneys' fees, the remainder being expenses. A similar result could have been achieved much earlier in the litigation. With early disposition there are fewer expenses to be deducted from the settlement fund, thereby creating an incentive of receiving a greater percentage of the fund in attorneys' fees. The integrity of the attorneys' fee application process would be enhanced, and the class members would receive at least the same benefits and receive them earlier.[93]

As shown by the study of Northern District class actions from 1985 through 1993,[94] the percentage-of-recovery approach substantially weakens the interests of the class. Early and cheap settlements are encouraged because class counsel will receive a quick thirty percent of the recovery for attorneys' fees. For the most part, the only content in attorney fee petitions are "puff" statements prepared by the attorneys seeking fees. No examination of reasonableness factors are undertaken, and no evidence of attorneys' hours are submitted. In addition, hours for paralegal support are customarily added to the thirty percent as expenses. Objectors are provided no evidentiary mechanism to oppose such fee requests. For class members receiving five cents on the dollar in a quick settlement—as opposed to the amounts demanded in the complaint, presumably after Rule 11 mandated reasonable inquiry—the attorney fee award is perceived as unfair, particularly since the amounts could be as high as several thousand dollars per hour.

If fairness to the class is considered, arguments supporting the percentage-of-recovery standard, based on class counsel's tendency to cheat and the court's inability to control attorney avarice without incurring extra time and expense, are actually arguments in favor of the blended reasonable approach, discussed below. Courts routinely review statutory hourly fees, at times with the assistance of a master and without substantial complaint.

### 3. *The Reasonable or Blended Approach*

Many courts perceived flaws inherent in a strict time-based system and developed an alternative set of criteria, which considered quality of work, risk, difficulty of the case, and other relevant factors facing

91. *See infra* appendix A, chart D.
92. 723 F. Supp. 1373 (N.D. Cal. 1989).
93. *Id.* at 1379.
94. *See infra* appendix A, chart D.

class action practitioners. In *Johnson v. Georgia Highway Express, Inc.*,[95] the Fifth Circuit articulated twelve factors to be used in common fund attorney fee assessments, based on the *Model Code of Professional Responsibility*.[96] This method of calculating awards was subsequently adopted by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.*[97] Although the blended reasonableness approach requires judicial time, this standard, properly applied, will protect the class against egregious attorney manipulation of fees.

Regardless of which standard is applied, the review of attorney fee petitions is held in a non-adversarial proceeding, with the court having only limited information. Rarely do members of the class or the settling defendants who lack financial interest in the fund that they have created come forward to provide insight on fee petitions.[98] As noted by Judge Patel in *In re Activision Securities Litigation*,[99] the court is abandoned by the adversary system at the point of application for attorneys' fees, and left to the plaintiff's unilateral applications and the judge's own good conscience.[100]

In short, class counsel has vastly enhanced power with obvious conflicts of interest, unbridled by judicial scrutiny or restraints. Abuse of class interest in these situations is described below, together

95. 488 F.2d 714, 717-19 (5th Cir. 1974).

96. *See id.* at 717-19. These factors include (1) time and labor required; (2) novelty and difficulty of the questions involved; (3) the skill necessary to perform the legal services properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of professional relations with the client; and (12) awards in similar cases.

97. 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 591 (1976).

98. *See In re* Oracle Sec. Litig., 131 F.R.D. 688, 693-97 (N.D. Cal. 1990) In that case, Judge Walker emphasized the inadequacy of court review of fee petitions. The hourly fee approach in the common fund cases creates an incentive to run up hours and/or to do too much work in relation to the stakes in the case. Since there is generally little or no monitoring of attorneys' performance throughout the case, it becomes almost physically impossible for the court to ascertain the amount of padding involved in such petitions. The court suggested that class actions should be handled on a contingent fee basis, with the attorneys bidding at the onset of the case to obtain the right to class counsel by the lowest competitive bid, subject to the court satisfying itself as to the quality of representation by the competitive bidders. Such competitive bidding, particularly if the bidding set contingent fees at different levels during different stages of the trial, would appear to be an effective way to deal with the deficiencies in the present system. *See also In re* Continental Ill. Sec. Litig., 813 F. Supp 633, 639 (N.D. Ill. 1993)(approving Judge Walker's approach of selecting class counsel with competitive bidding; though it has not yet met the test of appellate approval).

99. 723 F. Supp. 1373 (N.D. Cal. 1989).

100. *Id.* at 1374.

with recommendations for special class action masters or magistrate judges.

## V. CLASS ACTION CATEGORIES AND THE WEAKENING OF NOTICE RIGHTS UNDER AMENDED RULE 23

Adequacy of representation is the *sine qua non* of class actions and remains essential throughout the lawsuit, not just at the time of certification.[101] Under class action law, if the requirement of adequate representation—which encompasses identity of claims, issues, and remedies—is satisfied, due process does not require notice giving class members the opportunity to appear or opt out.[102]

All due process rights are personal and may be waived or satisfied by consent.[103] The principles of waiver or consent assume that notice fully informs the absent class member of the situation so that a considered choice is possible.[104] Notice giving opportunity to appear or to opt out fulfills fairness and due process in class actions in the following manner:

1. If the absent class member appears and participates pursuant to notice, the class member has had her day in court, and the case is no longer a representative action as to the appearing party.

2. If the class member opts out, the class judgment is not binding as to that member; consequently, there can be no due process violation.

3. If the class member neither appears nor opts out, that member may be deemed to have waived any objections and to have consented

101. *See, e.g.*, Grigsby v. Northern Miss. Medical Ctr., Inc., 586 F.2d 457, 461 (5th Cir. 1978); Gonzales v. Cassidy, 474 F.2d 67, 72 (5th Cir. 1973); Lewis v. Phillip Morris, Inc., 419 F. Supp. 345, 351-53 (E.D. Va. 1976).

102. Hundreds of cases have upheld the refusal to give notice in (b)(1) and (b)(2) cases, based upon the assumption of adequate representation. *See* WRIGHT ET AL., *supra* note 24, § 1786. *E.g.*, Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1337 (1st Cir. 1991).

103. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985). *See also* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703-04 (1982)(stating that personal jurisdiction may be intentionally waived because it represents an individual right and that an individual may consent to personal jurisdiction).

104. Many if not most class action notices are inadequate and/or misleading. Typically, notices do not describe atypical issues or problems in adequacy of representation. The notice may be further misleading by stating that adequacy of representation has already been established by the court in a certification hearing. For a class member to make the decision to waive rights or to consent to representation, the notice should specifically describe the representative claims and remedies, the class claims and remedies, and the differences therein, if any, as well as the qualifications of the representative and counsel.

to be bound by the representation on all class claims, remedies, and issues, provided the notice is adequate.[105]

During the certification process, the scope of class claims as compared with the scope of the named representative's claims may be unclear.[106] Presumably, a properly worded notice which clearly defines the class and the representative claims may incite some response from class members and thereby assist in clarifying the scope of class claims, remedies, and issues. Such notice may lead to a better evaluation of the representation. Responses to the notice may lead to a redefining of the class, a limiting of the issues, or even decertification. Conversely, the absence of any response following proper notice may be evidence that the current level of representation is adequate.

In drafting amended Rule 23, the Advisory Committee created four categories, based on uncertain generalities, that established a class right to notice giving class members the opportunity to be heard or to opt out.[107] Rather than protect absent class members, these categories tend to detract from fairness and due process considerations because of the technical language upon which they turn. If a class action is classified as a (b)(1)(A), (b)(1)(B), or (b)(2) action, there is no class right to notice giving an opportunity to appear or opt out, although courts have the discretion to grant such rights.[108] These actions have been labelled as "mandatory class actions" in the sense that the parties must remain in the action and are bound by the outcome under the principle of res judicata. Recent trends broadening the mandatory classification for class actions have further diminished notice rights for class members.

### A. The (b)(1)(A) Category

The (b)(1)(A) category is defined by the interests of the opponent to the class. Rule 23(b)(1)(A) states that a suit may proceed as a class action if the opponent faces incompatible standards of conduct from the contentions of divergent parties.[109]

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105. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985).

106. Although this discussion links opportunity to appear and opportunity to opt out under Rule 23(c)(2), the two concepts are separate. Due process may be satisfied by waiver or consent based upon notice giving opportunity to be heard without opt-out rights, or based upon notice giving opt-out rights without an opportunity to be heard.

107. FED. R. CIV. P. 23(b).

108. FED. R. CIV. P. 23(c).

109. Section 23(b)(1)(A) of the Federal Rules of Civil Procedure reads as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

The problem is that all class litigation, even litigation for damages, has the potential to affect a defendant's standard of conduct. For instance, a suit for nuisance damages may be won by some claimants and lost by others, thereby creating "incompatible standards of conduct" for the defendant. Hence, damage actions, which are normally construed as (b)(3) actions, may also fall within the language of (b)(1)(A),[110] and the court may deny notice giving opportunity to appear or to opt out.[111] The confusion from such amorphous language has resulted in inconsistent case law on what exactly constitutes a (b)(1)(A) class action and games in which the category is manipulated to avoid the time and expense of giving notice.[112]

In a (b)(1)(A) class action, the focused concern is on the party opposing the class, not on the protection of absent class members. In order to effectively resolve all the claims without imposing conflicting

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(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .

FED. R. CIV. P. 23(b)(1)(A).

110. The "incompatible conduct" language in (b)(1)(A) is similar to that in Rule 19, which was amended in 1966. FED. R. CIV. P. 19. However, this phrase is only one factor in determining indispensable or necessary parties under Rule 19. *See generally* Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-11 (1968)(examination of the interests of the claimant, the interests of the absent parties, and the social interest in light of "equity and good conscience" are additional considerations required for compulsory joinder under Rule 19.) In comparison, these additional factors are ignored in the application of Rule 23, making "incompatible standards of conduct" the sole basis for a binding mandatory class action, regardless of other factors or competing interests. FED. R. CIV. P. 23(b)(1)(A).

111. *See* Reynolds v. NFL, 584 F.2d 280, 283-84 (8th Cir. 1978); Robertson v. NBA, 556 F.2d 682, 684-85 (2d Cir. 1977).

This possible confusion has caused some courts to say that (b)(1)(A) does not apply to damage actions. *See, e.g., In re* Bendectin Prod. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir. 1976); WRIGHT ET AL., *supra* note 24, § 1773 n.4.

112. *Compare In re* Greenman Sec. Litig., 94 F.R.D. 273, 276-78 (S.D. Fla. 1982)(granting (b)(1)(A) status to securities litigation) *and* Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977)(certifying (b)(1)(A) and (b)(1)(B) classes among business invitees injured or killed in a supper club fire, for claims that were purely for damages) *with In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305-07 (6th Cir. 1984)(vacating by writ of mandate the (b)(1)(A) certification of tort damage claims based in part on a faulty issue preclusion analysis) *and* Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340-41 (9th Cir. 1976)(rejecting by writ of mandate securities damage claims certified by lower court as (b)(1)(A) class action). *See also* Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D.N.H. 1971)(holding prosecution of separate actions by individual class members in patent infringement dispute would establish incompatible standards of conduct); Sultan v. Bessemer-Birmingham Motel Assoc., 322 F. Supp. 86, 91 (S.D.N.Y. 1970)(granting class action certification based on 23(b)(1)(A) because of the risk of inconsistent or varying adjudications in actions seeking damages cause by a false prospectus).

standards of conduct on the party opposing the class, it may be reasonable to deny opt-out rights. This is particularly important in cases where inconsistent injunctive orders could issue or where there is a possibility of civil or criminal contempt enforceable by fines or incarceration.[113]

However, denying opt-out rights to absent class members in (b)(1)(A) cases does not mean that notice giving opportunity to appear should also be denied, as is now authorized and practiced under Rule 23. The (b)(1)(A) category contemplates antagonistic interests within the class that may cause the defendant to engage in divergent and incompatible standards of conduct.[114] Divided interests among members of the class indicate an adequacy of representation concern in which notice giving opportunity to appear is essential to determine the range of contentions and any need for additional representatives or subclasses. Yet, this categorization generally leads to a denial of notice. The existence of multipolar conflicts within the class would strongly suggest that the opportunity to be heard must be granted in order for all protesting points of view to be brought forth and fairly adjudicated so that the question of adequacy of representation may be fully explored.[115]

### B. The (b)(1)(B) Category

Court decisions, commentaries, and historical precedent show that class actions may be used to prevent a race to judgment, wherein the first claimants to execute are fully compensated at the expense of later claimants who receive little or nothing due to depleted assets from payment of earlier judgments.[116] A related type of case involves claims to a single piece of property by multiple members of a class. In

113. A conflicting injunctive order situation would also fall within the (b)(2) category. *See* discussion *infra* section V.C.

114. To illustrate, consider a governmental authority with responsibility to build a dam, who may face a multipolar community reaction. If some members of the community oppose the dam entirely, and some favor the dam limited to a certain geographic area, while others desire a still larger dam to obtain greater electrical power, the governmental entity faces incompatible standards of conduct; further, some litigants may be suing for damages while others are seeking injunctions.

115. Defining and applying typicality and adequacy of representation requirements becomes difficult under (b)(1)(A). If adequacy of representation is reduced to a typicality standard, the representative could not operate to bind all absent members since the representative could not be typical with a class that has incompatible positions and interests. Unless subclasses are created, this type of situation would clearly violate both identity of claims and conflicts of interest safeguards.

116. *See* Reynolds v. NFL, 584 F.2d 280, 283 (8th Cir. 1978); Robertson v. NBA, 556 F.2d 682, 684-85 (2nd Cir. 1977); *In re* Alexander Grant & Co. Litig., 110 F.R.D. 528, 536-37 (S.D. Fla. 1986).

these limited fund or specific property cases, an individual judgment impairs or impedes the interests of other claimants.[117]

The (b)(1)(B) category stresses the interests of the members of the class whose claims may be impaired or impeded unless a class action is certified.[118] However, this key phrase, "impair or impede," is broad and uncertain.[119] The same language in Rules 19 and 24 has been construed to apply when the absent party is adversely affected by the stare decisis effect of litigation.[120] This interpretation applied in the context of Rule 23 means that since every absent class member may be impaired by the stare decisis effect of litigation, every potential class action could be classified as a (b)(1)(B) action, where notice giving appearance and opt-out rights may be denied. For this reason, some courts have interpreted the "impaired or impeded" standard as not including stare decisis effects.[121]

Nonetheless, the "impair or impede" concept remains one of great elasticity.[122] For example, it is unclear whether potential class claims

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117. The (b)(1)(B) category is not restricted to limited fund or specific property situations.

118. Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure reads as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivison (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> . . . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

FED. R. CIV. P. 23(b)(1)(B).

119. The (b)(1)(B) category is not a restatement of the old hybrid class action which involved class interest in the same property or subject matter of the action. The (b)(1)(B) category turns on the practical effect of the classification upon the members of the class and does not require a claimed interest in the same fund or property. Language of similar effect is found in Rule 24. However, the language adopted by the Committee for the (b)(1)(B) action is free from historic restraints imposed by related Rules 19 and 24. FED. R. CIV. P. 19, 24.

120. Atlantis Dev. Corp. v. United States, 379 F.2d. 818, 829 (5th Cir. 1967).

121. *See* Larionoff v. United States, 533 F.2d 1167, 1182-83 (D.C. Cir. 1976), *aff'd on other grounds*, 431 U.S. 864 (1977); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973). *See also* WRIGHT ET AL., *supra* note 24, § 1774 n.4.

122. *See* Resolution Trust Corp. v. KPMG Peat Marwick, No. 92-1373, 1992 U.S. Dist. LEXIS 16670, at *8 (E.D. Pa. Sept. 29, 1992)(in suit for negligent preparation of financial statements and other tort and contract claims, the court held that since a partner's admission against a co-partner may be admitted as a statement against interest in separate civil actions, the suit may be classified as (b)(1)(B) class action because rulings on evidence admissibility may be stare decisis in all cases, thereby justifying denial of notice, appearance, and opt-out rights). *See also* Technograph Printed Circuits, Ltd. v. Methode Elec., 285 F. Supp. 714, 723 (N.D. Ill. 1968) (holding possible comity between courts justified (b)(1)(B) classification).

must exceed the assets of the defendant in order to satisfy this standard, or whether settlement "funds" would be included within this concept.[123] How the total amount of potential claims or potential assets of the defendant are to be weighed is also unclear.[124]

### C. The (b)(2) Category

The (b)(2) category involves either injunctive relief or corresponding declaratory relief.[125] Any case may qualify for declaratory relief on certain issues even though the ultimate objective of the case may be either injunctive relief or damages. The issue is whether such cases involve "corresponding declaratory relief" within the meaning of (b)(2).

Of course any type of action may involve declaratory relief at least in part. For example, an action based on a product liability theory may initially request a declaration of liability against the defendant.[126] The declaratory ruling may be useful in obtaining an injunction in a subsequent proceeding as well as providing a basis for damages.

Whether combined injunction and damage actions may be certified as (b)(2) is an issue on which courts disagree.[127] While some have

123. If the "impair or impede" language is found to be applicable whenever a settlement amount is offered for less than the total amount of the claims, any damage action may be easily converted into a (b)(1)(B) action, thereby precluding appearance and opportunity to opt out.

124. *See In re* Bendectin Prod. Liab. Litig., 749 F.2d 300, 305-6 (6th Cir. 1984); Coburn v. 4-R Corp., 77 F.R.D. 43, 46-7 (E.D. Ky. 1977). *Compare In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 726-28 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (using a special master to conduct detailed investigation of the substantial probability or possibility that the compensatory claims might exhaust the assets and rejecting (b)(1)(B) on all claims except a punitive damages class), *cert. denied*, 484 U.S. 1004 (1988); *with In re* Greenman Sec. Litig., 94 F.R.D. 273 (S.D. Fla. 1982)(certifying class actions without investigation or findings of the value of the claimed damage losses).

125. Rule 23(b)(2) of the Federal Rules of Civil Procedure reads as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

FED. R. CIV. P. 23(b)(2).

126. *See* WRIGHT ET AL., *supra* note 24, § 1775 n.20.

127. *See* Laramore v. Illinois Sports Facilities Auth., No. 89-C-1067, 1993 U.S. Dist. LEXIS 1893, at *15 (N.D. Ill. Feb. 18, 1993). In *Laramore*, the residents of low-income housing in an area where a new stadium was to be built sought injunctive relief and damages. The court certified the class under (b)(2) because even though the class was seeking monetary damages, the injunctive relief was an

held that the possibility of a damage award means that the full (b)(3) rights must be afforded even in a declaratory relief action,[128] other courts have held that claims which combine injunctive and damage relief should be classified as mandatory.[129]

## D. The (b)(3) Category

The (b)(3) category of class actions is for damages. In order to maintain a (b)(3) action, specific conditions must be met in addition to the standard Rule 23(a) requirements.[130]

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integral part of the relief for the class. *See also* Gelb v. American Tel. & Tel. Co., 90 Civ. 7212, 1993 U.S. Dist. LEXIS 11554, at *1 (S.D.N.Y. Aug. 19, 1993). In *Gelb*, the court noted that by requesting certification under (b)(2), the plaintiff would avoid the notice and opt-out requirements of (b)(3), but allowed the plaintiff to pursue injunctive relief claim as class action without reference to damages. The court concluded that no conflict existed with notice requirement under (b)(3) because it was not considering whether to award damages at that time. It subsequently decided in its discretion not to order notice.

128. *See* Holmes v. Continental Can Co., 706 F.2d 1144, 1156 (11th Cir.) *cert. denied*, 464 U.S. 937 (1983); Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981); Johnson v. General Motors Corp., 598 F.2d 432, 437-38 (5th Cir. 1979).

129. *See* Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1299 (9th Cir. 1981); Kyriazi v. Western Elec. Co., 647 F.2d 388, 393 (3d Cir. 1981); Laskey v. International Union, 638 F.2d 954, 956-57 (6th Cir. 1981); Reynolds v. NFL, 584 F.2d 280, 284 (8th Cir. 1978); Robertson v. NBA, 556 F.2d 682, 686 (2d Cir. 1977).

130. Rule 23(b)(3) of the Federal Rules of Civil Procedure reads as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the difficulties likely to be encountered in the management of the class action.

FED. R. CIV. P. 23(b)(3).

These requirements obviously bear upon all class action categories. The structure of Rule 23(b)(3) does not mean that (b)(1) and (b)(2) class actions may have predominating uncommon questions, that the class device need not be superior to other procedural devices such as stare decisis, interpleader, or intervention, that the individual's interest in controlling litigation is irrelevant to (b)(1) and (b)(2) classes, or that judicial economy and manageability are not concerns in the (b)(1) and (b)(2) cases. Although such conditions are not apparent from the face of the rule, numerous cases cited below apply the above requirements to the other categories.

Rule 23(c)(2) provides that in a (b)(3) action, notice giving opportunity to appear and to opt out must be given in the best practicable manner,[131] which includes individual notices to class members whose names and addresses may be available upon a reasonable inquiry. Such notice may be something beyond the reasonable notice required under the constitutional *Mullane v. Central Hanover Bank & Trust Co.*[132] standard, and may be expensive—a factor that prompts some federal judges to classify actions as (b)(1) and (b)(2).[133] Class counsel may not urge notice because such notice may reveal dissent within the class leading to subclasses or decertification. Reducing the notice requirement to reasonable notice would be less expensive and might result in notice being ordered in more cases.

## E. The Impact of Categorization

Rule 23 leaves notice rights in (b)(1) and (b)(2) cases to the discretion of the trial judge and fails to recognize that the granting of notice may in certain cases be mandated under due process.[134] As a part of the discretionary notice provision, Rule 23 lists some of the advantages of notice for absent members of the class: notice may inform the court whether the class considers the representation to be fair and adequate; notice may also influence the class to intervene and present claims, defenses, or otherwise appear in the action.[135]

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131. FED. R. CIV. P. 23(c).

132. 339 U.S. 306, 315 (1950).

133. A key pragmatic factor issue is who pays for notice. Absent a settlement, notice costs in the federal system are initially advanced by the class counsel. Hence, the avoidance of substantial up-front costs is additional motivation for class representatives and counsel to seek certification as something other than a (b)(3) class.

134. In explaining discretionary notice, the Advisory Committee commented indirectly that the need for notice would be minimal to the extent that there is cohesiveness or unity in the class and that representation is effective. The Advisory Committee observed that mandatory and discretionary notice provisions are designed to fulfill the due process requirements set forth in Hansberry v. Lee, 311 U.S. 32 (1940), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). FED. R. CIV. P. 23(d)(2) advisory committee's note (1966). However, Rule 23 on its face does not alert the legal community to the requisite analysis of claims which are essential in evaluating cohesiveness or unity of the class.

135. Rule 23(d)(2) of the Federal Rules of Civil Procedure reads as follows:

> (d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies the court may make appropriate orders:
>
> . . . .
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action.

FED. R. CIV. P. 23(d)(2).

Although the court may alleviate potential due process problems by exercising its power to create subclasses and to appoint additional representatives appropriate for each of the subclasses, or by defining the scope of the class action by limiting the issues, such suggested techniques for solving due process problems are not a substitute for the lack of clarity in Rule 23.[136] Such ambiguity within the rule has led to category games, which seriously jeopardize notice, appearance, and opt-out rights.

The adverse impact of the categories and structure of the amended Rule 23 may be summarized as follows:

(1) *Distraction and confusion which result from combining two separate and distinct issues: whether class action is the superior device for efficiently resolving disputes, and what degree of protection should be afforded to absent class members as a matter of fairness and due process.*

Class actions are now accepted as efficient. The only standard should be whether the device is superior to other procedural methods of adjudication. The categories have outlived their utility, and the extensive legal effort and hairsplitting involved in isolating and defining the ambiguous lines only detract from analysis of fairness. Because of the distraction of category games, careful scrutiny of adequacy of representation on the claims, remedies, and issues is often missing in most federal courts.

(2) *The fallacy of the injunction/damage distinction and the irrationality of mandated notice for (b)(3) but not for (b)(1) or (b)(2) actions.*

In determining whether notice is required, the primary issue should be adequacy of representation through identity of claims. If there is historic identity of claims, fairness and due process are satisfied and notice is not required, although discretionary notice may still be appropriate in certain cases. If identity of claims is not satisfied or if evidence of identity is insufficient, notice should be required for purposes of ascertaining the scope of claims, remedies, and issues, and determining adequacy of representation for any atypical or divergent claims. The current category distinctions for notice—(b)(1) and (b)(2) actions, for which notice is not required, versus (b)(3) actions, where notice is required[137]—are not structured in the context of identity of claims or adequacy of representation.

136. For example, Rule 23(b)(3) does not discuss the issue of binding out-of-court claimants, nor does it make observations or requirements for the special problems of defendant class actions.

137. Numerous commentators have noted the arbitrary and irrational distinction drawn by the Rule between legal and equitable relief and notice rights. *See, e.g.*, George Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 26 n.65 (1983).

Rule 23 makes the fallacious assumption that all actions in which the sole remedy sought is damages involve diverse and atypical issues which cannot be adequately represented, and therefore the rule provides that notice must be given in all (b)(3) actions. To illustrate, a class action involving a single legal issue, such as whether employees are entitled to vacation pay on the Fourth of July, may be framed solely as a damage action. The amount of damages may be a matter of simple mathematical computation, albeit individually applied. In such a case, the sole issue is a question of law as to whether vacation pay is owed. Since the damage claims of the class are fully encompassed in the representative's claim, satisfaction of adequacy of representation would be far easier in this type of case than in an injunctive action or in (b)(1)(A) or (b)(1)(B) actions. A decision against the representative in this hypothetical damage action should be binding on the class under due process even if notice giving appearance or opt-out rights has not been extended.

Conversely, Rule 23 assumes that notice is not required in (b)(1) and (b)(2) cases because such cases supposedly involve homogeneous classes, and adequacy of representation is thereby fully assured. Injunctive or declaratory relief may involve multiple issues and a wide disparity of interests and remedies. By definition, (b)(1)(A) actions involve class claimants who are competing with each other.[138] Moreover, adequacy of representation is not automatic in (b)(2) cases. For example, a case seeking declaratory or injunctive relief with respect to integration in Los Angeles schools may involve diverse claims and conflicting remedies. Yet classifying this action as (b)(2) means that notice and opportunity to appear or opt out are not required. Adequacy of representation requires a continuing investigation and analysis of each claim, remedy, and issue in every case, and if adequate representation is found to be lacking, notice should be required as a matter of due process, regardless of whether the relief sought involves damages or injunctive remedies.

The Advisory Committee's explanation as to why notice is required under (b)(3) but not under the other categories is that an individual's interest is greater in a (b)(3) claim.[139] It assumes that an individual

138. *See* discussion *supra* section V.A.

139. Rule 23(c)(2) of the Federal Rules of Civil Procedure reads as follows:

> (c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.
>
> . . . .
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that
>
> (A) the court will exclude the member from the class if the member so requests by a specified date;

has a greater interest in seeking damages than in pursuing injunctive or declaratory relief. The Advisory Committee gives no reason for these tenuous and erroneous assumptions.

(3) *The irrational linking of notice giving opportunity to appear with notice giving opportunity to opt out.*

These two concepts have different rationales and purposes. To illustrate, opt-out rights ordinarily should not be granted in (b)(1)(A) or (b)(1)(B) cases because the exercise of such rights in (b)(1)(A) cases may defeat the resolution of divergent claims and subject the opponent to incompatible standards of conduct, and in (b)(1)(B) cases, may result in a race to judgment. On the other hand, notice giving opportunity to be heard should be granted for purposes of clarifying the scope of class claims, issues, and remedies, and evaluating the adequacy of representation.[140] This combination of appearance and opt-out rights in the rule has caused many courts to refuse notice altogether.[141]

(4) *The conflicting of (a)(3)(typicality) and (a)(4)(adequacy of representation) requirements in (b)(3) cases.*

The (a)(3) and (a)(4) requirements historically require an identity of liability claims between the named representative and the class. However, (b)(3) cases may include claims in which there are non-predominating liability questions affecting only individual members of the class. As a practical matter, representative claims cannot be typical when there are uncommon liability claims within the class, and uncommon claims cannot be adequately represented under an identity

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(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

140. Some confusion is generated by labelling (b)(1) and (b)(2) classes as "mandatory" and (b)(3) classes as "discretionary." If the focus is notice, it may be argued that a (b)(3) class action is mandatory because notice must be given and a right to opt out must be afforded, whereas in (b)(1) and (b)(2) actions, giving of notice and opt-out rights are not required but may be given at the court's discretion. *See* discussion *supra* sections V.A-V.D.

141. However, a few courts in their discretion have properly separated appearance and opt-out rights. *See* Resolution Trust Corp. v. Deloitte & Touche, 822 F. Supp. 1512, 1516 (D. Colo. 1993)(citing Robertson v. NBA, 556 F.2d 682, 686 (2d Cir. 1977)). In *R.T.C. v. Deloitte & Touche*, the court concluded that notice should be given to three subclasses of defendants to preserve opportunity for absent class members to intervene or move to decertify, but denied the defendants' request for opt-out rights on the ground that it would impair the central purpose of a (b)(1)(B) action. The court held that preclusion of a right to opt out did not violate due process.

of claims standard.[142] Rule 23 should make clear that if non-predominating liability claims affect only individual members, fairness and due process are satisfied by notice giving rights to appear and opt out.[143]

(5) *The insufficiency of the notice concerning claims, issues, and remedies.*

Notices must be sufficiently clear, understandable, and informative to enable class members to rationally decide whether to appear, opt out, or remain in the action and be bound by the outcome. Unfortunately, even where notice is ordered, the majority of notices are insufficient in content or misleading. The typical notice only lists the names of representatives and counsel, and contains little or no information about the claims, issues, and remedies sought by the representatives as compared with the class.[144] From such notice, the class member cannot determine which of his claims and remedies are represented; thus, an informed and rational choice is impossible.[145]

## VI. SETTLEMENT

Amended Rule 23(e) requires notice to class members and judicial approval for settlement or compromise of any class action.[146] The theory is that combining judicial approval with notice provides sufficient due process protection for the rights of absent class members in settlement. In practice, however, these pro forma safeguards serve little purpose. Class counsel and class opponents often subvert proper judicial supervision; notice of settlement is usually defective in either content, dissemination, or both; the named representatives have virtually no participation in class proceedings or have conflicting interests with the class; settlement hearings are cursory and limited; and appellate review, even if obtained, is rarely meaningful.

Under a literal interpretation of Rule 23(e), court approval is not required unless a certified class action is dismissed or compromised.[147] Hence, pre-certification settlements with individual mem-

142. *See* Mattoon v. City of Pittsfield, 128 F.R.D. 17, 19-20 (D. Mass. 1989)(finding typicality and adequacy of representation but denying (b)(3) certification because the uncommon claims predominated).

143. Non-exercise of appearance or opt-out rights acts as consent.

144. *See* Jordan v. Global Natural Resources, Inc., 104 F.R.D. 447, 448 (S.D. Ohio 1984)(rejecting notice with description of the representation and adopted abbreviated form instead). *Cf.* Chicken Delight, Inc. v. Harris, 412 F.2d 830, 831 (9th Cir. 1969)(limiting notice to one of two issues because it would involve significantly different evidence and separate factual determination as to each class member and imposing such a burden would be inconsistent with Rule 23).

145. *See infra* subsection VI.C.8.

146. FED. R. CIV. P. 23(e).

147. *See* Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) (holding notice requirement of Rule 23(e) does not apply to involuntary dismissals, although court approval is

bers of the proposed class might not fall within the scope of Rule 23(e).[148] The policy of Rule 23(e), however, has been extended to class action settlements that occur prior to class certification.[149] Cases reveal that courts are willing to approve settlements without certification as long as notice is given to absentees,[150] notwithstanding the fact that without certification, neither adequate representation nor res judicata is assured with respect to the absent class members.[151]

Settlement is a critical juncture where adequacy of representation should be reassessed.[152] Courts are directed to monitor adequacy of representation throughout the entire course of litigation in order to assure a fair and reasonable judgment for all class members. Such judicial oversight is intended to supplement, not function in lieu of, adequate representation. But in reality, adequacy of representation is virtually ignored in the majority of class action settlements.[153]

The class action lawsuit is a modern bill of peace. Thus, binding judgments, dismissals with prejudice, and general releases are demanded as consideration for settlement by the parties opposing the class. No defendant wants to pay several million dollars into a settlement fund only to discover that later, additional persons may bring

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still necessary) *cert. denied*, 401 U.S. 912 (1971). *See generally* John J. Conroy, Jr., Comment, *Notice of Postjudgment Settlements in Class Action Litigation*, 73 NW. U. L. REV. 909 (1978)(stating that Rule 23(e) also does not apply to post-judgment settlements, which may lead to additional problems. The recommended practice with respect to post-judgment settlements would be to give notice or to obtain judicial approval consistent with the policy of Rule 23.).

148. *See* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972).

149. *See* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. (E.D. Pa. 1967)(holding that an action settled before certification presumptively must be considered as a class action so as to require court approval according to Rule 23(e)). *See also* WRIGHT ET AL., *supra* note 24, § 1797 n.19 (citing other cases that settled at certification or cases in which settlement was delayed until class was certified). *Cf.* Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971)(requiring notice and court approval of settlement without 23(c)(1) certification).

150. *See* WRIGHT ET AL., *supra* note 24, § 1797 n.24.

151. A binding settlement, with res judicata effect, is particularly crucial for the opponents of the class, who are seeking a complete resolution of litigation.

152. Rule 16(c)(9) instructs the court to encourage settlement. FED. R. CIV. P. 16(c)(9). Rule 408 of the Federal Rules of Evidence further encourages settlement by prohibiting class litigants from establishing liability using communications made during compromise negotiations. FED. R. EVID. 408.

153. *See* Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498 n.2 (1991)(stating "the familiar axiom that a bad settlement is almost always better than a good trial" (quoting *In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)). *See generally* Sylvia R. Lazlos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 308 n.1 (1985)(citing the rules and studies on the subject of encouraging settlement in class action litigation).

litigation. But such finality means that those absent members of the class who stand to lose their claims require a certain level of protection.

A study of all class actions in the Northern District of California from 1985 to 1993 reveals that over eighty percent were resolved by settlement.[154] An in-depth analysis of the settlement process is crucial for evaluating the protection afforded to the class in these cases.

### A. The Alignment of Interests Against Absent Class Members in the Settlement Process

The adversarial system resolves disputes by having each side present its best arguments and evidence before a neutral court. In contrast, the class action settlement procedure, established pursuant to Rule 23, is non-adversarial for the most part, lacks sufficient supporting evidence, and produces results contrary to the interests of absent class members.

#### *1. The Named Representative*

If the requirement of adequate representation, including identity of claims, is satisfied, the named representative will be motivated to seek maximum settlement benefits on all claims.[155] This motivation may be diluted, however, if the representative is offered preferences over the absent class members in the settlement plan.[156] Moreover, settlement generally relieves the named representative of all ultimate responsibility for costs, which may serve as further incentive for the representative to assent to settlement. This is true particularly in those jurisdictions where liability for costs by the named representative is a prerequisite for maintaining a class action.

Absent these factors, the representative may still be powerless to act on behalf of the class during settlement negotiations and approval. The representative's participation is usually minimal both during litigation and during settlement proceedings. The fact that courts are free to ignore any objections to settlement made by the named representative further encourages passivity; class representatives seldom voice their views during settlement negotiations or appear at settlement hearings.

#### *2. Class Counsel*

Class attorneys are directly influenced by the anticipated monetary return. In many instances, the attorney who acts as class counsel

154. See *infra* appendix A, chart B.
155. *See* discussion *supra* Part III.
156. Preferences granted to named representatives are generally not disclosed in the notice of settlement and hearing.

is a litigation entrepreneur who has initiated and promoted the class action in order to obtain maximum profit at minimal risk.[157] Since risk of loss increases with the approach of trial[158] and settling the class action early maximizes the hourly return for class counsel, class counsel's motivation conflicts with the interest of the class in that the lower amount obtained in the earlier stages of litigation may undercut the value of class claims.

The dangers of attorney abuse based on economic motivation, including "sweetheart" deals such as fee agreements attached to dismissals, are well-documented in cases and literature.[159] Fee awards made part of the settlement agreement are generally accepted and approved by courts, often without any extensive inquiry as to the hours spent or the quality of representation. The opportunistic attorney may seek and include as part of the settlement an acceptance or at least non-opposition to padded hours or overstaffed activities.

This basic conflict of financial interest between class counsel and the class is built into every class action.[160] Except in extreme cases, however, such as collusion with opponents of the class, this conflict is not one that is recognized as defeating class status, otherwise no class action would be certified.[161] As previously discussed, such conflict is particularly acute in relation to settlement.[162] Very little judicial su-

157. *See* Burns, *supra* note 62, at 196 (proposing court-appointed monitors for class attorneys); John C. Coffee Jr., *supra* note 62, (recognizing conflicts between counsel and class).

158. Loss includes costs advanced by class counsel to maintain the class action, as well as anticipated attorneys' fees, which are normally contingent upon recovery.

159. *E.g.*, Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991); Lowenschuss v. Bluhdorn, 613 F.2d 18 (2d Cir. 1980), *aff'g* 78 F.R.D. 675 (S.D.N.Y. 1978), *cert. denied*, 449 U.S. 840 (1980); Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385 (1987).

160. *See* discussion *supra* section IV.C.

161. Even public interest attorneys may have conflicts with the class with respect to goals and remedies of the class action suit. For example, while the attorney may see the case as one that could establish injunctive relief which would alleviate sexual or racial discrimination for decades in a company's business practices, the present employee members of the class may prefer monetary damages in hand rather than amorphous regulation of future conduct.

162. See *supra* subsection IV.C.2. *See also* Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 681-82 (7th Cir. 1987)(problem in class action setting which necessitates court approval of settlements is that class counsel is potentially an unreliable agent of his principals); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Andrew Rosenfield, *An Empirical Test of Class-Action Settlement*, 5 J. LEGAL STUD. 113 (1976). According to Rosenfield, a partial solution to the problem of named plaintiffs being nominees or pawns of the lawyer, and unnamed class members having too little at stake to spend time monitoring the class lawyer, would be to have lawyers compete to represent the class. Courts note the importance of judicial review of fairness of settlement to class members before allowing settlement to go into effect and extinguish claims of those who do

pervision of legal fees occurs during or after settlement.[163] Even when such monitoring takes place, it fails to resolve the conflict described herein. The *Manual for Complex Litigation* catalogues a wide range of attorney abuses,[164] which further support the conclusion that more, not less, restraint upon attorneys is necessary to protect the class.[165]

*3. Opponents of the Class*

Where a finding of defendant liability is probable, a class action settlement might result in a lower amount of total damages compared to the aggregate of individual claims tried independently. Defense counsel, therefore, seek the broadest possible judgment and release for their clients in settlement and negotiate for settlement amounts within insurance limits. Needless to say, the interest of absent class members is not among the concerns of defense counsel, except to the extent that they seek a complete and binding resolution via settlement to avoid any subsequent individual claims.

Even if it seems unlikely that the class would prevail on its claims, class opponents might want to settle out as quickly as possible in order to avoid rising attorneys' fees and costs or to mitigate the potential negative impact of protracted litigation, such as bad press, poor public relations, and disruption of normal business activities.[166] Factors which cause settlement unrelated to merits include (1) unusually risk-averse defendants, (2) astronomically high potential damages, (3) an hours-based contingency compensation system for plaintiffs' lawyers, (4) agency problems inherent in class actions, and (5) insurance and indemnification rules that make substantial sums of money not paid directly by the parties available for negotiated settlements but not for judgments after trial.[167]

Insurance also plays a dominant role in inducing settlement. Defendants generally want to maximize insurance coverage, and negoti-

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not opt out of the settlement by effect of res judicata, especially in cases where class certification is deferred to the settlement stage. *Id.*

163. Recently, the author attempted to refer a case to a prominent plaintiff class action firm, to be paid hourly at rates of $400-plus per hour in monthly billing periods. The referral was declined because the law firm, which specialized in class lawsuits with "rapid resolutions," was averaging in excess of $1,000 per hour.

164. MANUAL FOR COMPLEX LITIGATION § 1.41 (5th ed. 1982).

165. John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS., Summer 1985, at 5, 69-74; Bryant Garth, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988).

166. In a study of shareholder class action lawsuits for securities fraud, which were filed following stock market fluctuations in high technology stock issued during 1983, the findings show that the merits of the litigation were almost entirely divorced from settlement considerations. *See* Alexander, *supra* note 153, at 523.

167. *Id.* at 500.

ating a settlement to frame the case in terms of claims within the scope of coverage is preferable to taking the case to trial, which could expose defendants to uninsured claims.[168] Typical are settlement agreements that are based on the weaker claim of negligent misrepresentation, instead of intentional misrepresentation which is not covered by insurance.[169] Furthermore, limits on insurance coverage encourage settlements within amounts provided under the policy. The fact that insurance companies continue to sell officers and directors indemnification policies and other indemnity insurance supports the conclusion that the cost of class settlements is built into a profitable insurance market.

*4. The Court*

Settlement approval allows the court to quickly resolve hundreds of claims and clear the calendar. Although courts ostensibly are entrusted with protecting the due process rights of absent class members, constraints on time and resources severely limit the courts' ability to evaluate the scope of class claims, remedies, issues, and the course of settlement negotiations. Courts are generally captive to whatever assertions are made by counsel, and independent investigations by the courts into the fairness of settlements seldom occur. In short, judicial economy takes precedence over the protection of absent class member interests.

*5. The Absent Class Members*

Absent members of the class face very little risk in going to trial and tend to be more concerned with the merits of the claim and the net recovery. They have little or no burden in terms of discovery, little risk of counterclaims, no need to deal directly with attorneys, and they incur little cost. If the class action proceeds to a successful conclusion, absent class members receive their portion of the award either from settlement or judgment, with no more direct effort or involvement than submitting a simplified claim form.

However, no participation also means no control. If unnamed members decide to appear and object to settlement, their concerns and protests are often trampled in the rush to settle. Furthermore, absent class members have little chance of getting an approved settlement overturned in appellate review.

Although the adequate representation requirement is the primary protection available to absent class members, settlement proceedings

168. *Id.* at 557.

169. *Id.* (citing interview with David B. Gold, plaintiffs' attorney in *In re* Eagle Computer Sec. Litig., [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,741 (March 26, 1986), in Stanford, California (May 10, 1990)).

rarely entail any examination into adequacy of representation despite the fact that settlement will extinguish the class claims. Only in a limited number of cases where notice elicited objections from the class have courts engaged in more thorough evaluations of settlement proposals.[170]

## B. Special Problems in Pre-certification Settlements

The court may tentatively certify the class for settlement purposes without public hearing and set the matter for settlement notice and hearing pursuant to Rule 23(e).[171] Pre-certification settlements raise special problems in addition to aggravating the general defects in the settlement process. By definition, the pre-certification settlement agreement is negotiated by counsel who is not the official authorized representative attorney for the class at that time.

As the Seventh Circuit observed in *In re General Motors Corp. Engine Interchange Litigation*,[172] pre-certification settlements invariably affect the integrity of the negotiation process. Among the dangers of pre-certification settlement is attorney-shopping by the defendant with respect to settlement negotiations. Since the attorney purporting to represent the class is not yet the official authorized representative, a defendant may undermine negotiations by attempting to reach a more favorable settlement with an attorney representing another member of the class rather than deal with the "unofficial class counsel." Thus, unauthorized settlement negotiations necessarily entail the plaintiffs' bargaining from a position of weakness.[173] Furthermore, unauthorized settlement negotiations deny other class counsel access to information concerning such negotiations which may be helpful in evaluating the fairness of the settlement.[174]

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170. *See infra* appendix A, chart C.

171. Almost 50% of class actions are settled before the class has been certified, subject to certification and settlement approval by the court. *See infra* appendix A.

172. 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

173. *See id.* at 1125. *Cf. In re* Boesky Sec. Litig., 948 F.2d 1358 (2d Cir. 1991)(involving lead counsel who had authority to enter into settlement agreements, and settlements could contain a provision for a reduction or satisfaction of any judgment against the nonsettling defendant). *See also* William E. Haudek, *The Settlement and Approval of Stockholders' Actions—Part II: The Settlement*, 23 Sw. L.J. 765, 771-72 (1969). Houdek notes that although courts will not approve settlements which are unfair or inadequate, "fairness" may be found anywhere within a broad range of lower and upper limits. Whether a given "fair" compromise might not have been more fair if the negotiating attorney possessed better information or had been animated by undivided loyalty to the class is not discernible. The court may reject a settlement as being inadequate; it cannot undertake the partisan task of bargaining for better terms. *Id.*

174. *See In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1125 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979)(holding that information relevant to an attorney's proper exercise of fiduciary duty to the class includes options con-

The temptation to enter into an early "sweetheart" deal with class opponents, thereby ensuring class counsel status and fees, is almost irresistible. Even public interest attorneys are not exempt from the defects inherent in pre-certification settlements. The prestige of negotiating a large settlement against a corporate defendant, thus acquiring a reputation as a consumer advocate, may place public interest attorneys in a situation analogous to private counsel who hope to win large fee awards by becoming class counsel.[175]

Although some courts have required that certification granted for purposes of settlement must be given special scrutiny,[176] the reality is that such scrutiny simply is not possible in non-adversarial proceedings with a non-existent record. Pre-certification settlements magnify the existing defects in the class action settlement process: conflicts within the class as to claims, issues, and remedies are buried, and adequacy of representation is ignored; the bases for attorneys' fees are vague and often unsubstantiated, with fee-sharing agreements undisclosed; a record on the merits may not exist; the court has no information or participation in the settlement, and judicial approval is perfunctory rather than supervisory.

## C. Deficiencies in the Settlement Process

### *1. No Record on the Merits*

Generally, combined certification-settlements do not have a factual record on the merits. In the class action study, forty-seven percent of the cases had little or no discovery prior to certification-settlement.[177] Although extensive inquiries into the merits are neither required nor appropriate for settlement approval, only those cases which proceed in litigation mode for a substantial period of time produce any type of record from which a court can evaluate the fairness of a settlement proposal.

In practice, courts rely primarily on the arguments and recommendations of counsel,[178] despite inherent conflicts of interest,[179] which in

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sidered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain resolution by settlement).

175. *Id. Cf. Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1552 (1976)(noting the conflict of interests created not only by counsel seeking large fees after settlement, but also by counsel pursuing "his own ideological goals without regard to the desires of class members").

176. Mars Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 681 (7th Cir. 1987); Plummer v. Chemical Bank, 668 F.2d 654, 657-81 (2d Cir. 1982).

177. *See infra* appendix A, chart C and comments.

178. *Cf.* Anderson v. Torrington Co., 755 F. Supp. 834 (N.D. Ind. 1991)(ordering counsel to submit outlines of the evidence on the merits).

179. *See* discussion *supra* Part II.

effect delegates to the attorneys the courts' duty to protect the interests of absent class members.[180]

### 2. *The Failure to Require a Showing and Make Findings on Adequacy of Representation*

In practice, the papers seeking conditional certification in conjunction with settlement do not focus on adequacy of representation. The named representatives are identified only by name or a minimal description which does not disclose their claims, the issues, and the remedies they are seeking. Hence, courts have no basis for evaluating the identity of claims requirement, (i.e., comparing the claims of the named representatives with those of the class). Nonetheless, courts routinely approve such conditional certifications without inquiry, evidence, or findings. Similarly, notices for settlement hearing are deficient in terms of informing the class as to adequacy of representation.

Certain appellate decisions strongly condemn this practice.[181] The Second Circuit, in *Plummer v. Chemical Bank*,[182] declared that adequacy of representation and fairness of compromise are questions of fact for the district court, and while courts are not expected to convert settlement hearings into mini-trials on the merits, they should explore the facts to the extent that would render feasible intelligent determinations concerning adequacy and fairness.[183] The Second Circuit further admonished that findings and conclusions should not be based solely on the arguments and recommendations of counsel; there must be some evidentiary foundation in support of the proposed settlement.[184]

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180. *Contra* Plummer v. Chemical Bank, 668 F.2d 654, 659 (2d Cir. 1982).

181. *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992); *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Since interests of the lawyer and the class may diverge, as may the interests of different members of the class, certain interests may be wrongfully compromised or sold out without drawing the court's attention. Class settlements are susceptible to abuse because of the limited control exercisable by class members. *Id.*

182. 668 F.2d 654 (2d Cir. 1982).

183. *Id.* at 659.

184. *See id.* at 659 n.4. "Simply put, a court may not delegate to counsel the performance of its duty to protect the interests of absent class members." *Id.* The district court in *Plummer* was bound to withhold approval of the settlement until the joint settlement proposal had been closely and carefully scrutinized to ensure that it was fair, adequate, reasonable, and not influenced in any way by fraud or collusion. Furthermore, the court had to be satisfied that in this type of across-the-board settlement the named plaintiffs were adequate representatives of the entire class and had no interests antagonistic to the other class members. *Id.* at 658.

Notwithstanding these critical opinions, the study on class action practice disclosed that no evidence or findings were made with respect to adequacy of representation in approximately eighty percent of the class actions in the Northern District of California.[185] Extensive violations of Rule 23(a) and due process occurred where certification and settlement were combined or where certification was granted conditional to settlement.[186]

*3. Lack of Named Representative Participation*

One of the purported functions of the named representative is to act as a check on class counsel. For example, if the class claims are unfairly compromised or otherwise sacrificed in settlement by the class attorney, the representative whose interests coincide with the class would be expected to defend the class interests and object to quick settlements that offer minimal recovery for the class.

In reality, however, most courts and counsel ignore the named representative during most of the class action proceedings, including settlement. Class counsel is not required to consult with the representative, and courts do not require or solicit any feedback or information concerning the views of the named representative in the settlement hearing. In the Northern California class action study, class representatives did not participate in 100% of the cases.[187]

Although some courts required a certain level of representative participation in the early 1970s,[188] the recent trend is to shunt aside any obstacles in the way of class action settlements. Not only are representatives generally discouraged from voicing their views, any objections made by representatives are frequently overruled by judges relying primarily on the opinions of class counsel.[189]

The current trend essentially nullifies the requirements of Rule 23(a). It is absurd to require identity of claims to initiate a class action only to cast aside the class representative throughout the remainder of the case. The reasoning of *General Telephone Co. v. Falcon*[190] should govern: attorney consultation with class representatives should be mandated by and reported to the court, and the views of the representative should be accorded substantial weight in the settlement hearing in evaluating whether a proposed settlement is fair, adequate, and reasonable.[191]

185. *See infra* appendix A, chart C.
186. In cases where separate adversarial certification hearings were held, at least the essential protections were the subject of some degree of scrutiny.
187. *See infra* appendix A.
188. *See supra* Part III.
189. *See supra* Part III.
190. 457 U.S. 147 (1982).
191. *Id.* at 161.

*4. Intra-Class Conflicts Buried in the Settlement Process*

*a. Dissent Among the Class*

Dissent among the class may create complications and delay, which stand in the way of easy certification and settlement approval. Class counsel has no duty to affirmatively ascertain or disclose intra-class dissent and may even oppose notice which could reveal conflicts within the class. The fact that counsel must also advance the cost of notice serves as an additional disincentive for class attorneys to uncover dissent.

Courts also are under no affirmative duty to investigate the possibility of intra-class dissent. The failure to give adequate notice of a settlement plan of distributions and preferences combined with the cursory nature of settlement proceedings further contributes to the egregious lack of protection afforded to class members.

*b. Undisclosed Preferences*

One source of intra-class conflict stems from preferences granted to class representatives.[192] Presumably, named representatives protect the class because they have the same claims as class members. Preferences—justified as compensation for time and effort expended on behalf of the class and in some jurisdictions for incurring direct or indirect financial costs—realign interests between the representative and the rest of the class.[193] Such bonuses or extra compensation enable class counsel to buy off dissenters and avoid the troublesome issues of conflict, unfairness, and inadequacy of representation.

Often the fact of such preference is not disclosed to the class in the notice of settlement hearing, which effectively eliminates any objections that may be forthcoming had such information concerning settlement been revealed.[194] Cases in the late 1970s and early 1980s abhorred such preferences,[195] but recent cases permit such practices more freely.[196] In the Northern District of California study of class

192. Notice of settlement often does not disclose the existence of preferences.

193. To illustrate, if class members each have claims with the asserted value of $10,000, a settlement of five cents on the dollar may elicit strong objections from the representatives. However, if the representatives are given bonuses of $10,000 from the settlement fund for their "efforts" on behalf of the class, the named representatives cease to have identity of claims with the rest of the class since they stand to gain more from accepting the terms of the settlement.

194. In addition, the plan of distribution of the settlement fund, in which preferences are normally disclosed, is neither included nor even summarized in the notice of settlement hearing.

195. Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); *In re* General Motors Interchange Litig., 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

196. White v. Morris, 811 F. Supp. 341 (S.D. Ohio 1992)(upholding settlement although only the named representatives received monetary damages); Enter-

actions, preferences were granted to representatives or portions of the class in thirty seven percent of the cases, based only upon general recommendations of class counsel, without presentation of any supporting evidence.[197] Even if the justification for preferences is accepted, courts should require evidence of the representative's extra time and effort and their reasonable value. In cases where settlement approval was denied, obvious preferences granted to representatives over absent class members were revealed prior to the settlement hearing,[198] but even such egregious preferences have been upheld in other decisions.[199]

### 5. *Defects in the Content of Notice for Settlement Hearing*[200]

The general rule regarding the content of settlement notices is that the notice must "fairly apprise the prospective members of the class of

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prise Energy Corp. v. Columbus Gas Transmission Corp., 137 F.R.D. 240 (S.D. Ohio 1991)(giving incentive award of $50,000 to each of the six class representatives).

197. See *infra* appendix A.

198. *See* Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983)(awarding one half of back pay to eight named plaintiffs held to be unfair); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982)(requiring additional evidentiary support for more generous treatment given to named plaintiffs over other members of the class).

199. *See, e.g., In re* Jackson Lockdown/MCO Cases, 107 F.R.D. 703 (E.D. Mich. 1985)(named representative plaintiffs to receive $2,000 to file suit and aggressively pursue litigation).

200. The drafters of Rule 23 in 1966 apparently decided on two different notice requirements for two specific class action procedures.

Rule 23(c)(2) states that "[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2) This is similar to, but more specific than, the *Mullane* standard which relies on notice "reasonably calculated to reach interested parties." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).

In contrast, Rule 23(e) states with respect to dismissal or compromise that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e) Under Rule 23(e), the court has discretion as to the means of notice employed and its content so long as *Mullane* is satisfied. *See* WRIGHT ET AL., *supra* note 24, § 1797 n.54 (1986 & Supp. 1994)(citing cases with variety of notice schemes upheld by the courts).

The *Mullane* standard of settlement notice, contemplated by Rule 23(e), requires less than the notice of certification for damages in a (b)(3) proceeding. Thus, settlement notice should be formulated to "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

In general, courts have protected absentees at least as to the manner of service. *See* Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992)(finding the notice was

the terms of the proposed settlement and of the [available] options."[201] Class members should receive enough information in the notice so that they may decide whether to object or, if permitted, to opt out. The usual notices, however, fall substantially short of providing sufficient or accurate information to render rational decisionmaking possible.

*a. Adequacy of Representation Is Not Described*

Despite the fact that adequate representation is integral to the fairness of a settlement,[202] adequacy of representation is seldom described in notices or even listed as an issue for the settlement hearing. The most fundamental principles underlying class actions limit the powers of the class representatives to the claims they possess in common with other members of the class. Yet the typical settlement notice does not describe the claims and remedies of the named representatives, which means that class members cannot know whether they have been adequately represented in settlement negotiations. None of the class notices in the Northern District of California study provided any information concerning adequacy of representation.[203]

Several lower court decisions have justified such deficiencies by holding that notice is only designed to serve as guidance to the major terms of agreement and to enable further inquiry.[204] The flaw in this reasoning, however, is that few if any class members with small or medium-sized claims are willing or able to travel to a distant city to examine the court records in order to obtain necessary information

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not the best practicable notice when class representative provided notices to brokerage house but notices were not forwarded).

201. Philadelphia Housing Auth. v. American Radiator & Standard Sanitary Corp., 323 F. Supp. 364, 378 (E.D. Pa. 1970).

202. Adequacy of representation remains a viable issue at every stage of the class action proceeding and information concerning representation is crucial to a decision to object or to opt out.

203. *See infra* appendix A.

204. O'Brien v. National Property Analysts Partners, 739 F. Supp. 896, 901 (S.D.N.Y. 1990). *Accord In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 224 (5th Cir. 1981)(stating that although the notice might have been better had it included the information that some of the representatives believed the settlement to be inadequate, the failure to require such information was not an abuse of court discretion), *cert. denied*, 456 U.S. 998 (1982). *See also* Jordan v. Global Natural Resources, Inc., 104 F.R.D. 447, 448 (S.D. Ohio 1984)(rejecting the longer notice which included a description of the named plaintiff and his cause of action, and deciding that the abbreviated notice, which identified neither the named plaintiff nor counsel, was adequate); Bennett v. Behring Corp., 96 F.R.D. 343, 353 (S.D. Fla. 1982)(rejecting objections that were raised because the notice had failed to inform the class that one of the three named plaintiffs opposed the settlement).

concerning the case.[205] Furthermore, such information is not necessarily available in the court files. For example, in the combined certification-settlement cases in the Northern District of California study, counsel did not bother to identify the representative's claims.[206]

Adequacy of representation in settlement negotiation should be a key issue at the settlement hearing.[207] Courts have the discretionary power to require that class members be notified of an opportunity to state whether they consider the representation to be fair and adequate.[208] Courts should make written determinations concerning adequacy of representation, and the subsequent settlement agreement should not extend beyond the class definition or the representative's claims.

*b. Objections by Representatives Are Not Disclosed*

To avoid dissent, objections, or opt outs, class counsel generally do not include in the notice that some or all of the named representatives oppose the terms of the settlement agreement. Despite the fact that the existence of such opposition is vital to an absent class member's evaluation of her options, this information may not appear in the public file. In the cases in the Northern District of California class action study, there was no mention of any objections in the notices.[209]

*c. Plan of Distribution Is Not Revealed*

The settlement agreement, notice, and hearing focus on the amount of the settlement fund and related terms. The plan of distribution provides the scheme and details on how and to whom the settlement fund will be paid. Class counsel might not reveal the distribution details until the day of the settlement hearing or even later because such details may disclose preferences or other disparate treatment of class members which could give rise to conflicts of interest and might impede or delay settlement approval. Such distribution information is crucial to class members' decisions whether to object or

205. Hiring an attorney for this purpose would substantially reduce or even exceed the net value of the claim.

206. *See infra* appendix A, chart C.

207. The language and holdings in a number of cases so indicate. *See* WRIGHT ET AL., *supra* note 24, § 1797.1 n.27. *See also* Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982)(holding that in reviewing settlement, the district court must review adequacy of representation of the entire class); National Super Spuds v. New York Mercantile Exch., 660 F.2d 9 (2d Cir. 1981)(holding trial court not warranted in approving settlement).

208. *See* Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982).

209. *See infra* appendix A.

to opt out, yet various courts have upheld the denial of access to this information.[210]

In summary, the class member who receives the currently accepted form of settlement notice is provided no information in the notice or in the record on the merits as to adequacy of representation, the position of the named representatives, the course of settlement negotiations, the details of attorneys' fees, or the method or amount of settlement distribution. Such notices should be deemed unreasonable and a denial of due process.

### 6. *Lack of Judicial Supervision*

#### a. *Settlement Negotiations*

The duty of the court to review class settlements derives from the potential for abuse and conflict between counsel and the class.[211] Under the current settlement procedure, courts generally do not have access to information that may be essential for purposes of evaluating fairness, such as the options that were considered and rejected in settlement negotiations, the issues that were discussed, the class opponent's reactions to various proposals, and the amount of compromise necessary to obtain resolution through settlement.[212] All of these matters are within the proper scope of the judiciary's duty to evaluate a proposed settlement prior to granting approval. However, courts neither participate in settlement negotiations nor require information concerning such negotiations under the rationale that settlements are private contracts which cannot be forced by a court. Yet, the requirements of due process and Rule 23(e) mandate judicial review of class action settlements for fairness and adequacy of representation.

The court's duty to review settlements should include participation or at least familiarization with the negotiation process by the court or by an appointed master, thereby ensuring that all compromises will be fully revealed to the court, including all conflicts, claims, issues, and remedies. This type of inquiry, however, has been rejected in recent decisions,[213] although the court's power to disapprove or suggest additional terms or changes necessary to gain approval justifies such in-

210. *See In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 170 (2d Cir. 1987)(stating there is no requirement that a distribution plan be formulated prior to settlement notice); *In re* Cement and Concrete Antitrust Litig., 817 F.2d 1435 (9th Cir. 1987); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 165 n.22 (S.D. Ohio 1992)(distribution plan not necessary in evaluating fairness of the settlement).

211. *See* Mars Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 681-82 (7th Cir. 1987); *In re* General Motors Engine Interchange Litig., 594 F.2d 1106, 1125 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

212. *In re* General Motors Engine Interchange Litig., 594 F.2d 1106, 1125 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

213. *See* Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992).

quiry.[214] In the Northern District of California study, no court made detailed examinations of settlement negotiations, and none of the proposed settlements were modified or invalidated.[215]

*b. Attorneys' Fees*

In jurisdictions which award attorneys' fees using a benchmark percentage of thirty percent of the total recovery, the attorneys do not provide details as to how many hours were spent or how they were spent; a mere conclusory affidavit by class counsel as to their own competency is deemed sufficient. Hence, the fact that class attorneys are reaping several thousand dollars per hour remains undisclosed. The Northern District of California class action study revealed that the majority of suits had no supporting evidence to justify the requested percentage fee.[216]

In those jurisdictions which apply a lodestar or hourly analysis for the award of attorneys' fees, more details are required as compared with the benchmark jurisdiction practices, but the petitions artfully avoid descriptions of attorney activity which may reveal overstaffing or redundant or irrelevant tasks designed to increase hours.

Finally, in nearly all jurisdictions fee sharing between class counsel and other counsel is neither disclosed nor the subject of judicial inquiry. Fee sharing not only violates the rationale of attorneys' fees based on hourly effort, it eliminates competition among potential class counsel and avoids embarrassing questions about dissent or incompetency. None of the cases in the Northern District of California study required disclosures of any existing fee-sharing agreements.[217]

*7. The Settlement Hearing*

Even if objections to adequacy of representation are made at the settlement hearing, in most instances such objections are overruled without evidentiary examination as to what occurred in the negotiating process.[218] The mere fact of objection, even by all or a majority of the named representatives, will not necessarily bar judicial approval

214. Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)("It is because of the potential risk that plaintiff's attorneys and defendants will team up to further parochial interests at the expense of the class that the Rule 23(e) protocol employed by several circuits explicitly includes scrutinizing settlements for indicia of collusion.").

215. *See infra* appendix A.

216. *See infra* appendix A.

217. *See infra* appendix A.

218. *See, e.g.*, Boyd v. Bechtel, 485 F. Supp. 610 (N.D. Cal. 1979). In a few circuits, the trial court must prepare reasoned responses to any objections, including findings of fact. *See* Sanders v. Naval Air Rework Facilities, 608 F.2d 1308 (9th Cir. 1979); Mandujano v. Basic Vegetable Prod., Inc., 541 F.2d 832 (9th Cir. 1976).

of the settlement.[219] In *In re Corrugated Container Antitrust Litigation*,[220] the court, while acknowledging divergent interests were not adequately represented, nonetheless upheld the settlement as fair under an abuse of discretion standard.[221]

The problem is that groups with divergent interests may not be properly represented during settlement negotiations, and when presented with a *fait accompli* at the settlement hearing, they have little or no chance of overturning the settlement agreement.[222] Even if the overall settlement is fair in terms of total amount or relief secured, details concerning distribution of funds or injunctive remedies may differ among divergent class interests. Without being adequately represented in the negotiating process, potential subclasses with dissenting interests will most likely view the general plan of distribution as unfair.[223]

Some courts place a heavy burden of proof on the objectors to demonstrate that the decree is unreasonable;[224] others attach an initial presumption of fairness to the settlement upon recommendation of class counsel.[225] Under either burden, the objector must submit evidence to show that the settlement is unfair, which may be difficult if dissent has not been explored and the objector is provided with only a limited or non-existent record on the merits.

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219. *See* Bennett v. Behring Corp., 96 F.R.D. 343 (S.D. Fla. 1982). *See also In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 224 (5th Cir. 1981)(holding that failure to require information that some of the representatives believed the settlement to be inadequate was not an abuse of discretion).

220. 643 F.2d 195 (5th Cir. 1981).

221. *Id. Cf.* Marshall v. Holiday Magic, 550 F.2d 1173, 1177 (9th Cir. 1977)(resolving claim of inadequate representation and conflict of interest by providing opportunity to opt out of the settlement).

222. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980); Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978)(upholding settlement based on overall review of fairness, notwithstanding distinct conflicts of interest between subclasses of retired and active members of the NFL).

223. The list of factors to be considered in settlement approval in most federal courts does not explicitly include adequacy of representation. The following list of factors has been developed by the courts to determine whether a proposed settlement is fair, adequate, and reasonable: (1) the strength of plaintiff's case and the likelihood of success on the merits, as balanced against the amount of the proposed settlement versus the amount sought via litigation; (2) any evidence of collusion between named parties and class counsel; (3) reactions of the class to settlement, based on silent ratification, absence of objections, or a majority of favorable communications; (4) the opinions of class counsel; and (5) the stage of proceedings and the amount of discovery completed. MOORE ET AL., *supra* note 24, § 23.80(u).

224. *See* United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991).

225. *See* White v. Morris, 811 F. Supp. 341 (S.D. Ohio 1992).

In a few cases, the court has engaged in a careful analysis of all aspects of the settlement, including adequacy of representation.[226] The Seventh Circuit originally held that objectors must be allowed reasonable discovery on the conduct of negotiations and adequacy of representation.[227] In subsequent cases, however, the Seventh Circuit has refused discovery absent a showing of collusion.[228]

Most settlement hearings are cheerleading sessions in which class counsel and class opponents present the court with minimal information, and judicial approval is routine. To add insult to injury, the class member who decides not to stand in front of this steamroller toward resolution of the case is treated by some courts as ratifying the settlement by virtue of his failure to object.[229]

*8. Permitting Opt Out Does Not Cure All Defects*

Giving class members the opportunity to opt out is not a reasonable substitute for the protection of class interests, which has been steadily eroded by virtue of existing defects in settlement procedures. The unfairness to class members is manifest, and applying any concept of informed consent for failure to opt out of such proceedings is highly questionable.

Often, the absent class members are not provided sufficient information to formulate a rational decision on whether to opt out or to remain bound by the terms of settlement. Where key information bearing on the case—such as intra-class dissent, preferences, conflicts of remedies, or opposition to settlement by the named representative—has been withheld, the absent member is operating on erroneous assumptions in making a decision as to claims that may be inadequately compensated or permanently lost.

In deciding not to opt out, particularly in combined certification settlements, class members may assume that representation is adequate, even though the named representative may not even have participated in the settlement process and adequacy was never reviewed or determined by the court. Although courts are generally unfamiliar with settlement negotiations, class members reasonably assume that judicial supervision will protect their interests. Class members would not be aware that in settlement hearings the court is often a captive

226. *See, e.g., In re* Joint E. & So. Dist. Asbestos Litig., 982 F.2d 721, 739 (2d Cir. 1992)(rejecting settlement and concluding that conflict was overwhelming in including health claimants and codefendant manufacturers in a single class); *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

227. *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

228. *See* Mars Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 681-82 (7th Cir. 1987); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992).

229. See discussion *infra* Part VIII.

audience to a non-adversarial proceeding in which the parties with the monopoly of information—class counsel and class opponents who have engineered the settlement—are pursuing interests that may be contrary to those of the class.[230] Furthermore, in most settled cases there is little or no record on the merits to enable any independent evaluation of fairness.

The best solution for settlement defects is imposition of a higher level of judicial supervision, with increased emphasis on adequacy of representation issues and better communication of vital information to class members. Courts should be clearly authorized and encouraged to use magistrate judges or special masters to increase the degree of judicial oversight during all stages of the settlement process.

## VII. APPELLATE REVIEW

Litigants seeking appellate review of rulings in class actions face substantial barriers both in time of appeal and in the standard of review.

### A. Interlocutory Review of Class Action Orders

In general, class actions are subject to the final judgment rule, 28 U.S.C. § 1291. Any order which is not a final judgment is interlocutory and not immediately appealable in order to prevent "the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy."[231]

Under the final judgment rule, the following class action orders are interlocutory and not immediately appealable: orders granting or denying certification,[232] orders granting or denying intervention as class representatives,[233] and orders granting or denying motions to disqual-

230. The court also exercises little control over attorneys' fees. *See* discussion *supra* section IV.D.

231. Coopers and Lybrand v. Livesay, 437 U.S. 463, 471 (1978).

232. *Id.* at 470. *But see* Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993)(reversing a denial of class certification on interlocutory appeal).

In the Second Circuit, the court in Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176 (2nd Cir. 1990), held that a denial of class certification was reviewable when the class representative's subsequent failure to prosecute its individual claims creates a final judgment. The denial of certification was deemed to have merged into the final judgment which resulted from the class representative's failure to prosecute. *Id.* at 179.

233. In Carlough v. Amchem Products, 5 F.3d 707 (3rd Cir. 1993), members of the class appealed the denial of their motion to intervene as class representatives. In denying their motion, the district court had assured the members that they would nevertheless be able to participate as objectors to the settlement agreement. The appellate court held that the members could not appeal, because "anyone who is involved in an action sufficiently to have a right of appeal from its final disposi-

ify the class attorney.[234] Once a final judgment is entered after trial or settlement, such orders may be reviewed as part of the appeal from the judgment.

There are exceptions to the final judgment rule which may permit interlocutory review in special situations. Orders granting or denying preliminary injunctions are immediately appealable in accordance with 28 U.S.C. § 1292(a), and class certification rulings that are integral to the injunction decision may be reviewed with the injunction ruling.[235] The courts of appeals have the discretionary power to issue writs of mandamus in "extraordinary" cases but this power is rarely exercised in the class action context.[236]

Class action certification rulings involve some factual analysis and thus do not qualify as "a controlling question of law as to which there is substantial ground for difference of opinion [when] . . . an immediate appeal may materially advance the ultimate termination of the litigation"[237] under 28 U.S.C. § 1292(b). In short, there is little likelihood of immediate review of class action rulings even though such rulings may be crucial and controlling in the future conduct of the case.

## B. The Standard of Review

Once final judgment is entered after trial or settlement of a class action, there is a right to appeal by objectors or verdict losers. In the overwhelming number of class actions the judgment is routinely affirmed under the abuse of discretion standard,[238] although in a lim-

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tion does not have an immediate right of appeal from a denial . . . of intervention." *Id.* at 712.

234. Council 31 v. Ward, 978 F.2d 373, 380 (7th Cir. 1992); Arney v. Finney, 967 F.2d 418, 422 (10th Cir. 1992).

235. *See* Gay v. Waiters and Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977); Inmates of San Diego County Jail in Cell Block 3B v. Duffy, 528 F.2d 954, 957 (9th Cir. 1975).

236. *See In re* Catawba Indian Tribe of S.C., 973 F.2d 1133 (4th Cir. 1992)(holding that the writ will not issue unless the district court's abuse of discretion in denying certification amounted to a usurpation of judicial power); Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976); Interpace Corp. v. Philadelphia, 438 F.2d 401 (3rd Cir. 1971).

237. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

238. *See, e.g.*, Mayfield v. Barr, 985 F.2d 1090 (D.C. Cir. 1993)(affirming the trial court's approval of a settlement agreement which dismissed the claims of the class but preserved the individual claims of the named representative); Binker v. Pennsylvania, 977 F.2d 604 (3rd Cir. 1992); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325 (1st Cir. 1991); United States v. Oregon, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); Van Horn v. Trickey, 840 F.2d 604 (8th Cir. 1988); Mars Steel v. Continental Ill. Nat'l Bank and Trust, 834 F.2d. 677 (7th Cir. 1987); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987)(reviewing settlement and notice under abuse of discretion standard); *In re* Cement and Concrete Antitrust Litig., 817 F.2d 1435 (9th Cir. 1987); Clark Equip. v. International Union Allied Indus. Workers, 803 F.2d 878 (6th Cir. 1986); Jones v.

ited number of cases the appellate courts have applied an error of law standard to various class action rulings.[239] On appeal, the error of law standard should be applied to protect the potential due process rights of absent class members, including adequacy of representation (identity of claims), conflicts of interest, the right to notice enabling appearance or opt out, and the content and manner of notice.

These rulings do not entail disputed fact issues, determinations of credibility, or other evaluation of evidence. Identity of claims requires a comparison of the claims alleged by representatives with class claims and the application of a legal standard of adequacy and typicality. It should be classified as an issue of law and reviewed accordingly. Similarly, conflicts of interest involve, in most instances, undisputed facts of claims, issues, remedies, and the application of a law standard to such facts. In such cases, error of law is the proper basis of review. Categorization with the attendant right to notice also concerns legal standards applied to given facts with the content and manner of notice encompassing the established facts applied to the legal requirement. All of these decisions relate to constitutional due process rights, thus, heightened review under an error of law standard is appropriate.[240]

Approval of settlement does require factual evaluations, and the abuse of discretion standard is appropriate unless due process problems exist. However, in most cases the all-inclusive use of the abuse of discretion standard operates to deprive the absent class member of his constitutional rights.

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Nuclear Pharmacy, Inc., 741 F.2d 956 (3d Cir. 1983); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); *In re* Corrugated Container Antitrust Litig., 643 F.2d 195 (5th Cir. 1981)(upholding content of class notice under discretionary standard). *But see, e.g.*, Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983)(reversing under an abuse of discretion standard).

239. *See, e.g., In re* Joint E and So. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992)(reviewing de novo a violation of typicality and adequacy of representation); Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992)(reviewing notice procedures as error of law); Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983) (holding abuse of discretion in refusing opt out); *In re* General Motors Engine Interchange Litig., 594 F.2d 1106 (7th Cir.)(defining class, adequacy of representation and conflict of interest), *cert. denied*, 444 U.S. 870 (1979); Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976)(treating categorization and notice as error of law).

240. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980); Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978)(upholding settlement based on overall review of fairness, notwithstanding distinct conflicts of interest between subclasses of retired and active members of the NFL).

## XIII. RES JUDICATA AND COLLATERAL ATTACK

### A. Finality of Judgments and Settlements

Res judicata is the doctrine of finality, designed to put an end to litigation of the same claims and issues.[241] The rule is well settled that a claim, once litigated between parties, is barred from further adjudication between those same parties.[242] A judgment extinguishes all rights of the plaintiff as to remedies against the defendant with respect to all or part of the same transaction, or series of connected transactions from which the action arose.[243] Claim is defined broadly under res judicata principles,[244] which creates judicial economy by permitting a matter to be litigated only once.

In class actions, the members of the class are bound by the court's decision in the same way that res judicata binds individual claimants.[245] A claim that has been or might have been brought, once decided, is binding on all members of the class.[246] The court is required to define the class and to ascertain and list who may be bound by the judgment.[247]

A broad definition of "claim" creates an incentive for settlement by ensuring certainty and finality. Defendants seek a bill of peace, a universal release, and res judicata protection from all plaintiffs and pro-

241. Res judicata as used herein means either claim preclusion (traditional merger and bar) or issue preclusion (traditional collateral estoppel). Claim preclusion (merger) applies to a plaintiff who wins a final and valid judgment in the first action, such that he cannot relitigate any part of that claim against the defendant. Res judicata precludes not only further litigation on that particular claim but also any other claims that might have been brought. This doctrine also applies to defendants in that they cannot later assert defenses that might have been brought in the initial action. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982). Claim preclusion (bar) also applies to victorious defendants to prevent further litigation arising out of the same transaction or occurrence. Any defenses or claims that were or might have been brought in the first action merge with the first final judgment and cannot be brought later. *Id.* § 19.

242. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981); Cromwell v. County of Sac., 94 U.S. 351 (1876); RESTATEMENT (SECOND) OF JUDGMENTS § 17(3)(1982).

243. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

244. Claim is defined as the same transaction or occurrence. Transaction, in turn, is determined by factors such as "time, space, origin, or motivation, [and] whether they form a convenient trial unit." *Id.*

245. Section 41(e) of the Restatement of Judgments states:

> A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is . . . representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

RESTATEMENT (SECOND) OF JUDGMENTS § 41(e)(1982)

246. *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961).

247. *See* FED. R. CIV. P. 23(c)(3); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 461 (2d Cir. 1982).

spective plaintiffs by agreeing to completely dispose of a matter. Without broad and all inclusive res judicata, a defendant may be unwilling to settle.

Claim preclusion covers all matters which were or could have been litigated in a prior class proceeding.[248] Hence, the plaintiff class is prohibited from splitting claims.[249] Claim preclusion prevents alternate legal theories or relief, and any alternate remedies are merged in the final judgment.[250] Thus, under res judicata principles, a class obtaining judgment for injunctive relief loses all rights to damages as well. Res judicata requires a litigant to raise all interconnected claims and remedies in one suit. The doctrine puts all claimants on notice of its harsh effects[251] and promotes the policies of judicial efficiency and encouragement of settlements.

### B. Permissible Attack on Class Judgments and Settlements for Lack of Due Process

In tension with the doctrines promoting finality is the requirement that a judgment be valid. This tension raises two subsidiary questions: (1) whether the court had subject matter jurisdiction, and (2) whether the due process rights of the parties were observed.

Due process requires jurisdiction over the person, plus notice and opportunity to be heard under *Mullane v. Central Hanover Trust*.[252] In the class action context, due process may be satisfied by class representatives who "fairly and adequately represent"[253] the absent class members, or by notice to the class giving appearance or opt-out rights.[254] Due process by way of adequate representation is so crucial in class actions that collateral attacks, as well as direct attacks by way

248. *See, e.g.*, Bedgood v. Cleland, 554 F. Supp. 513 (D.C. Minn. 1982)(holding as res judicata prior class action challenging notice and hearing procedures used by Veterans Administration as to pension benefits, and barring instant action even though additional or differing relief requested in later suit); Environmental Defense Fund v. Alexander, 501 F. Supp. 742 (N.D. Miss. 1980)(holding that earlier class action brought to enjoin continued construction of a waterway project which the class lost barred subsequent complaint of insufficient studies and cost-benefit analyses). *See also* WRIGHT ET AL., *supra* note 24, § 1789.

249. To illustrate, if the class proceeds on one legal theory relating to a claim and loses, neither the class nor its individual members may later sue on the same claim using a different legal theory. If the plaintiff class obtains a judgment of $1,000,000, neither the class nor its individual members may later sue for more money on the same claim.

250. RESTATEMENT (SECOND) OF JUDGMENTS §§ 24-25 (1982).

251. *See* Matthews v. New York Racing Ass'n, Inc., 193 F. Supp. 293 (S.D.N.Y. 1961); Edward W. Cleary, *Res Judicata Re-examined*, 57 YALE L.J. 339, 340 (1948).

252. 339 U.S. 306, 314 (1950).

253. Hansberry v. Lee, 311 U.S. 32, 42-43 (1946).

254. Due process also protects against arbitrary choice of law decisions and against extrinsic fraud, such as bribery of a judge, which has precluded the opportunity to be heard. *See* Phillips Petroleum v. Shutts, 472 U.S. 797, 819 (1985).

of appeal and Rule 60 motions, are authorized. The absent class member who commences a new lawsuit in another court and is confronted with alleged claim preclusion from a class action settlement or trial judgment may attack the validity of that judgment on due process grounds.[255] Failure to certify a class negates the binding effect of judgment on absent members.[256] In addition, a representative who is incompetent or who serves her self-interests at the expense of the class, creates a judgment that may be subject to collateral attack even after certification.[257]

When the validity of a trial or settlement judgment in the initial class action is challenged in a second lawsuit, collateral attack necessarily involves a two-stage examination: (1) the original court must frame the judgment, including its extent or coverage;[258] and (2) the preclusive effect of the judgment must be tested in the subsequent liti-

255. *See* Hansberry v. Lee, 311 U.S. 32, 45 (1946)(establishing that inadequate representation by reason of conflict of interest between representative and the class renders class judgment void and subject to collateral attack for denial of due process); Airlines Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973)(finding inadequate representation and refusing to enforce settlement where union class representative admitted that claims of former employees were sacrificed for the benefit of present employees), *cert. denied*, 429 U.S. 1000 (1976); Fraternal Order of Police v. Brescher, 579 F. Supp. 1517 (S.D. Fla. 1984). *But see* Wren v. Smith 41 F.2d 391 (5th Cir. 1969)(binding absent class members without adequacy of representation analysis, even though conflicting and antagonistic position included within scope of class claims).

256. *See* Jones v. Caddo Parish Sch. Bd., 735 F.2d 923, 937 (5th Cir. 1984); Roman v. ESB, Inc., 550 F.2d 1343, 1356 (4th Cir. 1976); Jones-Bay v. Caso, 535 F.2d 1360 (2d Cir. 1976). *Cf.* Los Angeles Unified Sch. Dist. v. NAACP, 714 F.2d 935, 943 (9th Cir. 1983); Robinson v. First Nat'l City Bank, 482 F. Supp. 92 (S.D.N.Y. 1979)(class not certified because formal certification procedures were not available to the trial court at time action was brought).

257. *See* Sam Fox Publishing Co. v. United States, 366 U.S. 683, 691 (1961)(Justice Harlan noted that judgments in a class action bind only those members of the class whose interests have been adequately represented by existing parties to the litigation); Grigsby v. Northern Miss. Medical Ctr., Inc., 586 F.2d 457 (5th Cir. 1978)(remanding for reconsideration because representatives were not diligent in performing their obligations and were focused more on their individual claims than on the general claims of the class); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973)(collateral attack on prior class judgment wherein named representative failed to appeal; relief granted was limited only to the named representative; court held that class members were not bound by the failure to appeal and that part of the judgment could not be res judicata as to the class for reason of inadequate representation)(*citing* M. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967)). *See also* Crawford v. Honig, No. C-89-0014, 1992 U.S. Dist. LEXIS 13677, (N.D. Cal. Aug. 31, 1992)(declining to bar action because the learning disabled were not adequately represented in previous action to enjoin use of IQ tests for school placement); Lewis v. Phillip Morris, Inc., 419 F. Supp. 345 (E.D. Va. 1976)(permitting collateral attack because interests of seasonal employees not satisfactorily advanced and litigated in first class action involving claims of discrimination on behalf of all black employees).

258. *See* advisory committee note to the 1966 Amendment to FED. R. CIV. P. 23.

gation, since it cannot be pre-determined by the court adjudicating the judgment.[259] Further complicating this inquiry is the fact that preclusive effect and due process are classified as issues of substantive law which cannot be abridged, enlarged, or modified by the Federal Rules of Civil Procedure.[260]

Various circuits have relaxed the rules of res judicata or devised special rules which are irrational and uncertain in scope. For example, the Second Circuit bifurcated the claim preclusion rule in *Grossman v. Axelrod*,[261] holding that the bar of claims which "could have been brought" was inapplicable to civil rights class actions.[262] Although intended to bring about a more fair result, applying a different res judicata rule for civil rights cases violates the reasoning and language of *General Telephone v. Falcon*,[263] and creates barriers to settlement. The Fifth Circuit, in *Johnson v. General Motors Corp.*,[264] held that a prior 23(b)(2) class action for injunctive relief did not preclude subsequent suits for monetary relief because the plaintiff had not received notice of the class action.[265] The court in *Johnson* also held that the plaintiff was bound by the res judicata effect of the prior (b)(2) action with respect to additional injunctive relief sought, even though no notice had been given.[266]

*Johnson* and related cases[267] hold that adequacy of representation alone does not satisfy due process in class actions involving damages—a proposition that is at variance with several hundred years of class action law. *Johnson* also violates the basic res judicata principle of merger[268] and creates confusion as to the relationship between the requirements of adequate representation and notice.[269]

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259. WRIGHT ET AL., *supra* note 24, § 1789, at 245 n.16.

260. Rules Enabling Act, 28 U.S.C. § 2072 (1988); WRIGHT ET AL., *supra* note 24, § 1789, at 245 n.20.

261. 646 F.2d 768 (2d Cir. 1981).

262. *Id.* at 770.

263. 457 U.S. 147 (1982).

264. 598 F.2d 432 (5th Cir. 1979).

265. *Id.*

266. *Id.*

267. *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982)(citing Norris v. Slothouber, 718 F.2d 1116 (D.C. Cir. 1983)); Penson v. Terminal Transp. Co., 634 F.2d 989 (5th Cir. 1981); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979); Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976).

268. As related to class actions, the doctrine of merger requires that all alternative forms of relief are encompassed in the class judgment.

269. It would make more sense to interpret *Johnson* as ruling that there was inadequate representation in the case with respect to the monetary claims.

### C. Collateral Attack for Lack of Due Process Denied

Adequate notice of a settlement hearing satisfies due process and precludes collateral attack.[270] If notice, adequate in content and manner, is provided to the class[271] giving them an opportunity to appear or to opt out, class members may not later claim lack of due process.[272] Even if the settlement notice does not provide for opt out, due process is nonetheless satisfied by the opportunity to object[273] and the failure to object to settlement has been held to preclude any later contentions of inadequacy of representation.[274]

Since mere objections as to trial strategy are insufficient to show lack of adequate representation, it may be difficult as a practical matter for the class member to challenge settlement on grounds of inadequate representation in another lawsuit.[275] Given the impetus toward settlement approval, it is also highly unlikely that an objector would be able to succeed on appeal to overturn the settlement for lack of adequate representation.[276]

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270. *See* Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979)(holding that retroactive priority given only to class representative does not create conflict of interest because due process was satisfied in prior class settlement); Supermarkets Gen. Corp. v. Grinnell Corp., 490 F.2d 1183 (2d Cir. 1974)(holding that where reasonable notice is given, failure of individual or his counsel to receive notice and to opt out did not negate class judgment).

271. Pursuant to FED. R. CIV. P. 23(c)(2) or 23(e).

272. *See* Thompson v. Edward D. Jones & Co., 992 F.2d 187, 191 (8th Cir. 1993)(holding that settlement of prior securities class action is res judicata because investor, as member of the class, failed to opt out, object to terms of settlement agreement, or seek relief under FED. R. CIV. P. 59(e) or 60(b)); Peters v. National R.R. Passenger Corp., 966 F.2d 1483, 1486 (D.C. Cir. 1992)(rejecting inadequate notice claim where notice not received due to error in mailing address).

273. *See* TBK Partners, Ltd. v. Western Union Corp. 675 F.2d 456 (2d Cir. 1982)(upholding settlement without opt out against a substantial number of objectors, even as to appraisal claims which could not have been asserted in the class action); Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1292 (9th Cir. 1981)(holding that class members represented by counsel in settlement hearing are bound by the settlement).

274. *See* Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981)(approving settlement without opt out and ruling that failure to object was collateral estoppel on any later contention as to adequacy of representation); White v. NFL, 822 F. Supp. 1389, 1407 (D. Minn. 1993).

275. *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992).

276. *See, e.g.*, Walsh v. Great Atl. and Pac. Tea Co., 726 F.2d 956 (3d Cir. 1983)(approving settlement despite divergence of interest between former and current employees in distribution of fund); Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978)(upholding approval of settlement under abuse of discretion standard; conflicts of interest between present and former football players did not require subclassification); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975)(upholding settlement approval under abuse of discretion standard, notwithstanding the discrepancy in treatment of present and former franchisees). *Cf.* Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983)(disapproving settlement because inference of unfairness from disparate distribution to named

In summary, over ninety percent of class actions are resolved by settlement without much protection for the class beyond settlement notice under Rule 23(e). Settlements receive appellate court approval under an abuse of discretion standard following cursory review and are virtually unassailable by collateral attack based on due process, provided the settlement notice is adequate in content and manner of service.

## IX. CONCLUSION

The case for reform is clear. The substantial unfairness of class action processes documented above have undercut public confidence and trust. Studies on consumer responses to class actions have revealed that the public believes recovery awards to be inadequate and attorneys' compensation to be exorbitant.[277] These studies confirm the desirability of modifying Rule 23.

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plaitiffs was not rebutted); *In re* General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir.)(disapproving settlement in part because of conflict with subclass), *cert. denied*, 444 U.S. 870 (1979).

277. Gregory A. Falls and Debra Worden, *Consumer Valuation of Protection From Creditors Remedies*, J. OF CONSUMER AFF., Summer 1988, at 20-37; Dan S. Van Doren et al., *The Effect of a Class Action Suit on Consumer Attitudes*, J. OF PUB. AFF. & MARKETING, Spring 1992, at 45.

## X. APPENDIX A

### THE NORTHERN DISTRICT OF CALIFORNIA STUDY

The author studied the available records of all class action lawsuits which had been filed and resolved in the Northern District of California from 1985 through 1993. These cases were condensed into thirty-four files by related case combinations or consolidations. The predominate subject matter of these cases is shown in Chart A.

### CHART A

PREDOMINATE SUBJECT MATTER OF THE LAWSUIT AS FILED

| | No. |
|---|---|
| Securities | 21 |
| Civil Rights | 2 |
| Contract | 4 |
| Constitutional-Statutory Challenges to Gov't Action | 5 |
| Mass Torts | 1 |
| False Advertising | 1 |

### CHART B

RESOLUTION OF ACTIONS

| | Number of Consolidated Class Suits | % (Not Including Voluntary Dismissals and Remands) |
|---|---|---|
| 1. By settlement | 24 | 83% |
| A. Certification and Settlement Separated | | |
| 1. Certification by Stipulation | 6 | 20.6% |
| 2. Certification after Hearing. | 6 | 20.6% |
| B. Certification and Settlement Combined | 12 | 41.2% |
| 2. Decision on Merits with Certification | 1 | 3.4% |
| 3. Decision on Merits without Certification | | |
| A. Summary Judgment | 2 | 13.7% |
| B. Dismissals with Prejudice | 2 | |

(1) As shown by Chart B, 83% of these cases were resolved by settlement. (2) The remaining cases were resolved by voluntary dismissal or remand to state court. (3) Two-thirds of the settled lawsuits were certified by stipulation or received tentative certification for settlement purposes.

## CHART C

### ADEQUACY OF REPRESENTATION (FOR CASES WHICH WERE CERTIFIED)

Description of the claims, defenses, and issues averred by the representative as compared to the class (cases certified as class actions only).

| | | Yes | No |
|---|---|---|---|
| A. | In the complaint. | 24% | 76%* |
| B. | In the motion for certification. | 19% | 81% |
| C. | At the certification hearing. | 19% | 81% |
| D. | In the notice following certification giving appearance or opt-out rights. | | 100% |
| E. | In the motion for certification for settlement purposes and tentative approval of settlement (combined certification and settlement). | | 100% |
| F. | In the notice of hearing for settlement approval. | | 100% |
| G. | At the settlement approval hearing. | | 100% |

An analysis of adequacy of representation (identity of claims) did not occur at any time in over 75% of the decisions, as shown by Chart C. (1) No discovery took place in 30% of the cases. There was minimal discovery (a single request for documents) in 17% of the cases and substantial discovery in the remainder. (2) The named representatives did not participate in settlement processes in any of the cases, nor was there any discovery on the settlement negotiations. (3) In connection with the settlement hearing, objections were filed (in addition to opt outs) in 29% of the actions. Findings were filed in response to the objections in 42% of the cases in which objections were made.

Preferences to the named representatives occurred in four cases (16%), and inequality in the plan of distribution appeared on the record in five lawsuits (20.8%). There was no representative for those receiving lesser treatment in any of the cases. The plan of distribution did not appear in the settlement hearing notice or at the hearing in ten cases (42%). The right to opt out from the settlement agreement was granted in 70% of the cases.

Class attorneys received substantial awards (normally 25% to 30% of the common fund) with little or no judicial scrutiny, as shown by Chart D.

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* Merely asserting that the representative is a stock purchaser is not sufficient. In securities cases, the representatives and the class must be injured by the same misrepresentations or nondisclosures. Material disclosures create substantial difference in the same representation and reliance aspects of claims. If pendent state law claims are averred, individualized reliance and choice of law issues become crucial and should be identified. *See* Downs, *supra* note 2, at 690-94.

Furthermore a number of the securities cases involve pyramid schemes or multiple partnerships in which details of the representative's claim and involvement are vital but were undisclosed in the complaint or thereafter.

## CHART D

| Attorneys' Fees | Yes | No |
|---|---|---|
| Did attorneys receive what they requested? | 100% | |
| Did attorneys submit showing of number of hours expended? | 24% | 76% |
| Did attorneys submit detail on how hours were expended? | 8% | 92% |
| Method of Award: | | |
| Percentage of Recovery | 76% | |
| Lodestar or Balance of Factors | | 24% |